

Collective Management Organizations – Tool Kit

Musical Works and Audio-Visual Works

Robert Hooijer and J. Joel Baloyi

February 2016



TABLE OF CONTENTS

INTRODUCTION	8
OBJECTIVES OF EACH TOOL KIT UNIT	9
BIBLIOGRAPHY, PUBLICATIONS AND GENERAL REFERENCE MATERIAL	9
UNIT 1	
START UP CMO	10
Legislative and Regulatory Environment	10
1.1 Introduction	10
1.2 Laws and regulations applicable	11
1.3 Scope of protected rights	13
Initial Market Assessment and Consideration of other Key Environmental Factors	24
1.4 The history of collective management in the country	24
1.5 Economic and market factors	26
1.6 Technological factors	30
1.7 Socio-political factors	32
Identification of the 'Promoter Group'	33
Identification of Rights Holder Groups and Rights Holder Sensitization	34
1.8 Identification of the Rights Holder Groups	34
1.9 Rights Holder Sensitization	35
Initial Start-up Plan Development	36
1.10 Legal Nature and Bundle of Rights Considerations	36
1.11 Organizational Design, Structure and Governance	37
1.12 Methodology of Funding and Finance	39
1.13 Operations Management	40
1.14 Time-based Development Stages/Phases for 'Time to Market'	42
1.15 Basic Marketing and Communication including Member/Rights Holder/Owner Recruitment	43
1.16 Licensing and other Core Operational Functions	44
1.17 Prioritization of Administration Activities	47
1.18 Decision/s on Ancillary Services	48
1.19 CMO Assessment, Review and Quality Assurance Processes	49
Regional and International Matters	49
1.20 Affiliation	49
1.21 Support and Collaboration	50

Conversion of Initial Start-Up Plan into Full Horizon Plan	51
1.22 Monitoring and Review	51
1.23 Plan Adjustment	52
Schedule of Significant Tools in Unit 1	52
List of References	53
UNIT 2	
STRATEGY DEVELOPMENT FOR EXISTING CMOs	54
Introduction	54
The Place of Strategy in CMO development	54
Clarification of Vision, Mission and CMO Values Exercise	57
Stakeholder Review	58
Factors/Forces affecting CMO business	59
Environmental Scan/s	60
2.1 Historical factors	60
2.2 Legal and Regulatory Factors	61
2.3 Economic factors	63
2.4 Technological factors	66
2.5 Socio-political factors	70
2.6 CMO views of possible future developments	72
SWOT Analysis	72
2.7 Internal Issues	73
2.8 External Issues	73
CMO ‘Services Mix’	74
2.9 Product/Service	74
2.10 Price	75
2.11 Place	75
2.12 Promotion	75
2.13 People	76
2.14 Process	76
2.15 Physical evidence	76
CMO Organizational Design and Structure	77
Human Resources, Intellectual Capital and Other Resources	78
2.16 The Human Resources (HR) Function	79
2.17 The Role of Leadership	79
2.18 The Level of the CMO’s Investment in Learning and Development	79
2.19 Systems and Processes	80
2.20 Other Resources	80
CMO Critical Success Factors	81



Business Sustainability and Risk Matters	82
Gap Analysis	83
Establishment of Horizon Plan to address 'Gap'	84
Financial Budgets/Projections	85
Strategy Implementation	86
2.21 Specific Goals and Objectives	86
2.22 Major CMO functions	86
Executive Summary	87
Schedule of Significant Tools in Unit 2	88
List of References	88

UNIT 3

SOCIETY TARIFF DEVELOPMENT AND LICENSING PRACTICES FOR INTERMEDIATE CMOs

A. Tariff Development:	89
3.1 Nature of Collective Management Organization	89
B. Licensing Practices	108
3.2 Market Analysis and Research	108
3.3 Sales Data and Analyzes	110
3.4 Review of Complementary, Alternative or Competing CMO Services	111
3.5 Review and Choice/s of Licensing Channels or Structures	112
3.6 Domestic, Regional and Global Markets	113
3.7 Licensing Team Strategies and Policy	114
3.8 Staffing of the Licensing Function	115
3.9 Training and Equipping of Sales/Licensing Officials	116
Schedule of Significant Tools in Unit 3	117
List of References	117

UNIT 4

FINANCE AND LEGAL MATTERS FOR CMOs

A. Finance and Administration Matters:	118
4.1 Introduction	118
4.2 CMO Accounting and Finance for Non-financial Managers	118
4.3 Financial Accounting and Reporting	118
4.4 Management Accounting and Reporting	119
4.5 CMO Financial Management	119
4.6 Management Report Writing for CMOs	127
4.7 External and Annual Reporting	131
4.8 Analysis and Interpretation of CMO Financial Reports	133
4.9 Administration Systems Addressing Finance/Risk Issues	136

B. Legislative/Regulatory and Legal Matters	138
4.10 Introduction	138
4.11 Legislative Improvements and Reform	139
4.12 Regulatory Affairs	144
4.13 Dispute Resolution	147
4.14 Litigation Management	149
4.15 Other Legal Matters	154
Schedule of Significant Tools in Unit 4	157
List of References	157

UNIT 5	
COMMUNICATIONS AND MARKETING PLANS FOR CMOs	158
Introduction	158
A. Communications	158
5.1 Role of Communications for CMOs	158
5.2 Levels of Communication	160
5.3 Consideration of Delivery ‘Channels/Mediums’ to be Used	161
5.4 Developing a Communications Plan	164
5.5 Creation of Plan Timetable	171
5.6 Regular Evaluation and Reporting	172
5.7 Special Crisis/Disaster Section	174
B. Marketing	175
5.8 Marketing for the CMO environment	175
5.9 Developing a Marketing Plan	177
5.10 Typical Process Steps in a CMO Marketing Plan	178
5.11 CMO Image	182
5.12 Support for CMO Income Generation	183
5.13 New and Developing Usage Models	185
5.14 Leverage of Any Social and Cultural Activities	186
5.15 Promotional Activities and Advertising	187
5.16 Budgets, Schedules and Plan Monitoring	188
List of Significant Tools in Unit 5	190
List of References	190

**UNIT 6****DOCUMENTATION AND DISTRIBUTION – Notes 191****Introduction 191****Documentation 191**

6.1 Obligation to Register, Declare or Notify 192

6.2 Databases 192

6.3 Contracts/Agreements 195

6.4 Division of Fees Plan 196

6.5 International Co-operation 196

Distribution 196

6.6 General Distribution Rules, Policies and Practices 196

6.7 Distributable Income Computation 197

6.8 Usage Data Collection, Practices and Processes 198

6.9 Distribution Practices and Methods 200

6.10 Distribution Standards and Statements 201

6.11 Unidentified and Undocumented Works Usages 201

Schedule of Significant Tools in Unit 6 202**List of References 202****BIBLIOGRAPHY AND GENERAL REFERENCE MATERIAL AND PUBLICATIONS 203****List of Related WIPO Publications 203****List of Hyper-links to CMO Representative Associations 203****Note about the authors 203**

INTRODUCTION

From a national legislative perspective, there are various academic treaties on matters relating to copyright and neighboring rights. Over the years there have also been a number of books, publications and papers published on the important subject of collective management of copyrights and neighboring rights.

WIPO has, in addition to its extensive contribution to the international copyright and neighboring rights fields, commissioned experts to write material to be used in conjunction with various Collective Management training activities. To enhance practical materials available to interested parties, WIPO has engaged the writers to further produce and compile two tool kits, in co-operation with a number of non-governmental organizations (NGOs) representing collective management organizations (CMOs) in the fields of copyright in musical and audio-visual works and neighboring rights in sound recordings.

The contribution and assistance of the NGOs and other experts has been valuable and the writers' appreciation is extended to them all.

The two tool kits – one covering copyright in musical and audio-visual works and the other covering neighboring rights in sound recordings – address five subjects in detail with a short sixth subject for balance:

Unit 1: Start up CMOs

Unit 2: Strategy Development for Existing CMOs

Unit 3: Society Tariff Development and Licensing Practices for Intermediate CMOs

Unit 4: Finance and Legal Matters for CMOs

Unit 5: Communication and Marketing Plans for CMOs

Unit 6: Documentation and Distribution – Notes

Apart from the content detail, the writers have attempted to create each unit as a stand-alone module. However, in certain instances it was recognized that information applicable in respect of one tool kit applies equally in respect of the other – these similarities have been retained. The practical administrative issues covered in both sets of tool kits are indeed similar and the respective texts reflect this. In both tool kits, a short list of some significant tools emanating from each unit is included at the end of the unit.



OBJECTIVES OF EACH TOOL KIT UNIT

The subject matter of each unit in the tool kits has been selected by WIPO as areas of practical application and interest to those involved in collective management of copyright in musical and audio-visual works and neighboring rights in sound recordings. CMO officials involved in start-up operations through to intermediate societies will be able to find a subject of interest provided in the various units which follow. Each unit is written to be short enough to retain the reader's interest but detailed enough to provide some practical principles on the subject matter.

BIBLIOGRAPHY, PUBLICATIONS AND GENERAL REFERENCE MATERIAL

References to textual sources used are found at the end of each unit, which generally exclude Internet sources, which are accessible through the footnotes on the relevant pages of each unit.

UNIT 1

START UP CMO

LEGISLATIVE AND REGULATORY ENVIRONMENT

1.1 Introduction

1. Before incorporating a CMO, it is important to clearly understand the laws and regulations that apply in respect of the CMO concerned. It may be that the country concerned does not have any legal regime regarding the rights that the proposed CMO intends to administer. In that case, the first step would be to lobby legislators to introduce relevant laws. To do so, it would, of course, be necessary to garner enough support from those affected by the lack of laws. This would, in the case of musical works, include authors (both composers and lyricists including translators and arrangers – where applicable) and music publishers.¹ Other parties such as performers and producers, while not directly affected, may be sympathetic to the cause of authors and publishers. Because of the close association between authors and performers, and the fact that many authors are in fact also performers, performers may be sympathetic to the cause of authors. In the case of audio-visual works, the affected parties would be dependent upon the system that applies in the country concerned (see the discussion on audio-visual rights under paragraph 17 below).
2. To launch a successful lobbying program, it would of course be important for the rights holders concerned to present a persuasive case as to why it is necessary for their rights to be managed through a CMO. If the country's constitution makes provision for the recognition of human rights, especially those aligned to Article 15(1) (c) of the International Covenant on Economic, Social and Cultural Rights, this can be used as a starting point in making arguments for the need to protect authors' rights.² This would also empower the lobbyists to appeal to a broader section of society that is committed to the protection of human rights. Even without such constitutional protection however, the lobbyists can raise strong moral and economic arguments for the need to provide legal protection. They can, for example, highlight the fact

¹ In this publication the term 'authors' shall be used to refer to both composers and lyricists, and the term 'publisher' refers to music publishers. Where it is necessary to give a distinction between composers and lyricists this distinction shall be clearly made. Audio-visual authors shall be referred to as such and the expression 'authors' rights' shall be used both in respect of musical authors and audio-visual authors.

² Of course the rights holders may only properly rely on the International Covenant on Economic, Social and Cultural Rights if the country concerned is a signatory to this covenant.



that composers and lyricists are the ‘silent players’ who pen the wonderful tunes that performers interpret and ‘bring to life.’

1.2 Laws and regulations applicable

3. Having highlighted the above, it would now be important to consider the laws and regulations that apply in respect of the protection of authors’ rights. In this regard, we distinguish between the rights of authors of musical works and those of authors of audio-visual works. The main international treaty that provides protection in this regard is the Berne Convention of 1886 (‘the Berne Convention’ or ‘the Convention’).³ The Berne Convention has been termed the ‘most widely adhered to international law treaty in the sphere of copyright’.⁴ Article 1 of the Convention provides that the members of the Berne Convention constitute a union ‘for the protection of the rights of authors in their literary and artistic works’. In Article 2, (‘protected works’) ‘musical compositions with or without words’ and ‘cinematographic works to which are assimilated works expressed by a process analogous to cinematography’ are included within the meaning of the expression ‘literary and artistic works’.⁵ Commenting on the protection accorded to cinematographic works, it has been observed that this includes ‘works which are in some ways akin to cinematograph films though in the television and audio-visual domain’.⁶ Thus this goes beyond works that are recorded on film and includes other works that ‘are expressed by a process analogous to cinematography’, such as television broadcasts of works of a dramatic, dramatico-musical, choreographic, musical, cinematographic nature.⁷ The substantive provisions of the Paris Act of the Berne Convention (Articles 1 to 21 and the Appendix thereto) have been incorporated into the TRIPs Agreement which forms part of the 1994 Marrakesh Agreement of the WTO.⁸ The WTO system has been hailed as having introduced the most enforceable international treaty system, in particular through its dispute

³ The Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886. The version referred to here is the Paris Act of 1971.

⁴ Fraser S ‘The Copyright Battle: Emerging International Rules and Roadblocks on the Global Information Infrastructure’ 1997 15 J. *Marshall J. Computer & Info. L.* 762.

⁵ Sections 14 and 14bis of the Convention provide additional specific provisions with regard to the protection of cinematographic works.

⁶ *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)* (WIPO Geneva 1978) 15.

⁷ *Ibid* 16.

⁸ The only exception in this regard is the exclusion of the rights and obligations arising from Article 6bis of the Berne Convention dealing with moral rights, and the rights derived from them.

settlement mechanism with its ability to impose sanctions in the event of non-compliance.⁹

4. Apart from the Berne Convention, another international copyright treaty is the Universal Copyright Convention ('the UCC').¹⁰ The main feature of the UCC and its main distinction from the Berne Convention is its requirements for formalities in relation to the subsistence of copyright in a work.¹¹ However, since most countries are now part of the Berne Convention the application of the UCC is now of limited scope.
5. In 1996, in response to the changes brought about by the Internet revolution and its impact on the protection of copyright works in the digital environment, the so-called WIPO Internet (or 'digital agenda') treaties were promulgated. This includes the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). We are of course at present only concerned with the WCT. The Internet treaties aimed to improve the existing protection in relation to copyright and related rights by introducing new standards that are applicable in the digital environment and that serve to clarify existing protection.¹² As in the case of the TRIPs Agreement, the WCT requires member states to comply with the provisions of Articles 1 to 21 and the Appendix of the Berne Convention, and specifically requires the application of Articles 2 – 6 of the Convention, with the necessary changes having been made.¹³
6. To be able to benefit from the provisions of the above-named treaties, the country in which the new CMO is to be established must be a party to the relevant treaties. Where this is not the case a lobbying strategy may then be introduced to get the country concerned to join the treaties. However,

⁹ See in this regard, WTO Secretariat *A Handbook on the WTO Dispute Settlement System* (Cambridge University Press Cambridge 2004) 1; Yen C 'Flexibility and Simplicity as Guiding Principles for Improving the WTO Dispute Settlement Mechanism' in Georgiev D and Van der Borght K (eds) *Reform and Development of the WTO Dispute Settlement System* (Cameron May London 2006) 423.

¹⁰ Both the Geneva Act of 1952 and the Paris Act of 1971. The UCC is administered by UNESCO.

¹¹ Article III of the UCC permits member states to impose formalities such as deposit, registration, publication etc., as a condition of copyright and in this regard requires all copies of a work to contain a formal copyright notice consisting of the symbol ©, the name of the copyright owner and the year of first publication.

¹² The treaties, for example, clarify the fact that the reproduction right equally applies in the digital environment and the fact that rights holders can control whether and how their creations are made available to consumers in the digital environment, at a time and place chosen by the consumer, and that member states may establish exceptions or limitations to the rights that are applicable to the digital environment.

¹³ See Article 1(4) and Article 3 of the WCT.



even without joining the treaties it would still be possible to enact national legislation that conforms to essential tenets of these treaties.¹⁴

1.3 Scope of protected rights

1.3.1 Musical Works

7. All the treaties mentioned above make provision for *exclusive rights* in respect of musical works.¹⁵ This means that the owner of copyright in a musical work has an exclusive right to do any of the acts associated with the copyright in the work, or to authorize others to do so. In many common-law jurisdictions, the author is considered to be the *first owner* of copyright in respect of musical works, but the author can assign the copyright in the musical work to another person or entity (normally a music publisher). In some civil-law jurisdictions (e.g. Germany), copyright is not assignable and an exclusive (or non-exclusive) license is instead granted for the exploitation of the rights. The main exclusive rights provided for under the Berne Convention and having relevance to musical and audio-visual works are (i) the right of reproduction provided for in Article 9; (ii) the right of public performance provided for in Article 11; (iii) the right of broadcasting provided for in Article 11*bis*; the right of communication to the public provided for both in Article 11 and Article 11*bis*, and (iv) the right of adaptation provided for in Article 12.¹⁶ Of these rights, it is the right of reproduction, the right of public performance, the right of broadcasting and the right of communication to the public which, to varying degrees, lend themselves to collective management in the area of musical works. There are also other rights that are generally not of an exclusive nature but exist in the form of remuneration rights, such as the rental right and the private copy remuneration right.

¹⁴ Under such circumstances, however, the country concerned may not be able to benefit from the reciprocal protection of the works of their nationals in other countries, as the principle of national treatment embodied in these treaties would not apply to the country concerned.

¹⁵ We are of course here only concerned with economic rights and not with moral rights as provided for in Article 6*bis* of the Berne Convention.

¹⁶ Seeing that musical works often incorporate lyrics, which are protected as a literary work, the right of translation provided for in Article 8 may also have application where the lyrics are translated from one language to another.

(i) The right of reproduction

8. In the music industry the right of reproduction expresses itself in the form of what are termed mechanical rights,¹⁷ *synchronization rights*,¹⁸ *transcription rights*¹⁹ and *print rights*.²⁰ In many cases, synchronization rights and print rights are administered individually by the copyright owners themselves.²¹ This would either be the author himself or an assignee of the rights (usually a music publisher). The scope and extent of the mechanical rights administered is also often dependent on factors such as whether the country concerned follows a civil code (with its emphasis on authors' rights) or a common law legal system (with its emphasis on alienable copyright), and the extent of control of rights by music publishers. In civil law jurisdictions, mechanical rights have traditionally been jointly controlled by both authors and publishers, and the mechanical rights CMOs have generally administered these rights on behalf of both parties.²² In this regard, the rights have traditionally been administered through reciprocal agreements between CMOs in the various territories.²³ The legislations of certain countries also make provision for the remuneration of rights holders in the form of private copy levies or royalties payable in respect of the statutory exception permitting the reproduction of copyright works for private and/or

¹⁷ This is simply the reproduction of musical works through the making of sound recordings. Article 9(3) of the Berne Convention makes it explicit that '[a]ny sound ... recording shall be considered as a reproduction for the purposes of [the] Convention.'

¹⁸ This refers to the inclusion of musical works in the sound tracks of cinematography or other audio-visual works.

¹⁹ Transcription licenses are issued where adverts embodying musical works are used in audio formats, such as in radio commercials, syndicated radio programs, in-flight use by airlines etc. See in this Kohn A and Kohn B *Kohn on Music Licensing* (2010 Walters Kluwer Austin) 1063 – 1082.

²⁰ This refers to the inclusion of sheet music (and other forms of notated music) in printed works. The owner of the copyright in the musical work would also benefit from the reproduction of the musical work through the copying of the printed work concerned. This is normally termed the *reprographic right* and the right to receive payment of royalties from the photocopying of the literary work (and the embodied musical work) normally belongs to the publisher of the printed work concerned, who would, unless otherwise agreed with the owner of copyright in the embodied musical work, share a portion of the royalty received with the copyright owner of the musical work. Although reprography relates to the right to license the photocopying of physical copies, rights holders are also entitled to license the digital copying of their literary works (and any digital images embodied therein, e.g. the image of the sheet music embodied in the literary work).

²¹ In certain instances, however, mechanical rights CMOs have also administered synchronization rights. See Ficsor M *Collective Management of Copyright and Related Rights* (WIPO Geneva 2002) 57 at para. 128. Some national mechanical rights organizations have also licensed print rights on a case-by-case basis, when authorized by rights holders.

²² Rosen J (ed.) *Intellectual Property at the Crossroads of Trade* (Edward Elgar Publishing Cheltenham 2012) 145.

²³ Many mechanical rights CMOs are members of BIEM, usually in addition to being members of CISAC. See below under 2.6.1 for more information on these organizations.



personal uses. This levy is generally administered through a CMO or another statutorily recognized public entity.

9. On the other hand, in common-law systems such as the UK and USA the rights have traditionally been assigned to publishers and administered by the mechanical rights CMO²⁴ on behalf of the publishers. In the UK for example, the MCPS has administered these rights not as an assignee but as an exclusive agent, and the publishers have traditionally appointed sub-publishers in other countries to administer the rights on their behalf.²⁵ These sub-publishers may also belong to their own publisher-owned CMOs. Generally, where a publisher does not have local representation in a foreign territory the rights are administered through reciprocal agreements between the particular publisher's CMO and the CMO in the foreign territory. What is evident is the fact that in the UK (and many other common-law jurisdictions) the transfer and management of mechanical rights are 'regulated by well-established contractual practices ...'²⁶
10. The owner of copyright usually reserves the right to license the reproduction of *original* recordings of musical works and to negotiate relevant license fees in this regard. However, in many jurisdictions once an earlier recording of a musical work (and the words accompanying it)²⁷ was made with the consent of the copyright owner, further recordings of the musical work (and lyrics)²⁸ are permissible without the need for further consent from the copyright owner, subject to the payment of some form of equitable remuneration. Thus a system of compulsory licenses is applied with regard to such further usages. The remuneration payable may be by agreement of the parties or fixed by a competent authority (sometimes regulated by a statutory rate).²⁹ This situation is contemplated in Article 13(1) of the Berne Convention, which provides that the regime applies only in those countries which have imposed it. Mechanical rights CMOs are usually responsible for the licensing of recordings made under such a compulsory licensing system. However copyright owners (and users) often by-pass such a system and negotiate rates that are favorable or convenient to themselves.³⁰

²⁴ MCPS in the UK and the Harry Fox Agency in the USA.

²⁵ See Mazziotti G 'New Licensing Models for Online Music Services in the European Union: From Collective to Customized Management' 2011 Columbia Journal of Law & the Arts (34:4) 778.

²⁶ *Ibid.*

²⁷ The term 'recording' is used interchangeably with 'sound recording' and 'music recording'.

²⁸ The so-called 'cover versions'.

²⁹ See further in this regard *Guide to the Berne Convention*, supra note 6 at 79 – 80.

³⁰ See in this regard Passman DS All You Need to Know about the Music Business (6 edn.) (Penguin Books 2008 London) at 250 and 259.

11. Another matter to consider is whether the law concerned provides protection only in respect of *phono-mechanicals*³¹ or both *phono-mechanicals* and *broadcast-mechanicals*.³² The right to license phono-mechanicals is clearly established in the Berne Convention³³ and thus the laws of many countries make provision in this regard. With regard to broadcast-mechanicals, the situation varies from one country or region to another in line with Article 11*bis*(3) of the Berne Convention and the provisions relating to ‘ephemeral recordings’.³⁴ Nevertheless, a number of jurisdictions, especially those that have a strong authors’ rights culture, do make provision for the licensing of broadcast-mechanicals.³⁵ In other instances, broadcasters have agreed to procure a blanket license in respect of broadcast-mechanicals, in view of the fact that it is not always possible to limit the usage of the recordings to the period permissible under the ephemeral recordings regime, and further because the broadcaster may want to license the broadcast to others.³⁶
12. Another consideration to make in this regard is the licensing of mechanical rights in the digital environment. The advent of the Internet and other digital technologies has brought with it unique problems with regard to the licensing of copyright works and this, in fact, was one of the compelling reasons why the WIPO Internet treaties were enacted.³⁷ The ease with which MP3 and related technologies have made it possible for copyright works to be reproduced, while not diminishing the quality of the works – as well as the advent of peer-to-peer file-sharing networks – has brought about a licensing nightmare for rights holders. In Article 1(4), the WCT makes it explicit that the reproduction right set out in Article 9 of the Berne Convention applies

³¹ The expression ‘phono-mechanicals’ refers to the reproduction of musical works through the use of sound recordings (i.e. phonograms) embodied in music records (e.g. CDS, MP3s, vinyl records etc.).

³² The expression ‘broadcast-mechanicals’ refers to the sound recording of musical works for purposes of use in a broadcast.

³³ Article 9(3) of the Convention.

³⁴ That is, *transitory* recordings or recordings lasting for a short time.

³⁵ In Germany, section 55 of the German Act on Copyright and Neighboring Rights of September 9, 1965 (as amended) provides for the making of an ephemeral recording to be used for only *one* broadcast by the broadcaster and to be deleted within one month of such broadcast. The use of the recording in further broadcasts would thus require permission. Canada, though generally considered to be a common-law country, also has a regime for the licensing of broadcast-mechanicals. As in the case of Germany, the Canadian Copyright Act (R.S.C., 1985, c. C-42) permits the keeping of the ephemeral recording for no more than thirty days, after which the recording must be destroyed unless the copyright owner grants permission for its retention in exchange for payment of an applicable royalty (see Section 30.8 of the Canadian Copyright Act).

³⁶ See in this regard *Guide to the Berne Convention* supra note 6 at 71. This is for example the position in South Africa, where broadcast-mechanicals have been licensed through blanket licenses.

³⁷ Nationally, legislation such as the Digital Millennium Copyright Act (DMCA) of 1998 in the United States, were passed (or existing legislation amended) to deal with this digital onslaught.



fully in the digital environment and that the storage of a work in digital form in an electronic medium constitutes reproduction.

13. The problem is thus not one of uncertainty regarding the application of the reproduction right in the digital environment but one of ‘policing’ this right in an environment in which there are millions of potential infringers at any given time. As a result, ‘... it is often difficult to determine where particular acts have occurred in order to determine which copyright law to apply.’³⁸ The WCT has attempted to deal with this by introducing provisions requiring contracting states to provide for adequate legal protection and effective legal remedies against the circumvention of effective technological measures designed by rights holders as a way of restricting unauthorized access to and use of copyright works.³⁹ The WCT further obliges contracting states to provide effective protection against the manipulation of rights management information and similar acts having the effect of unreasonably prejudicing the interests of rights holders.⁴⁰ In this regard, it has however been observed that, ‘to be optimally efficient and able to deal with digital usage information’, CMOs need a rights management system with ‘an efficient ‘back-end’ system and a user-friendly online interface (‘front-end’), but also need to deal with the problem of fragmentation of rights.’⁴¹ To achieve this, especially after the so-called CISAC decision⁴² in the EU, there has been a trend, especially among the large rights holder groups and CMOs, to create a new form of customized collective management of rights in the online and mobile environment based on ‘mono-repertoire licensing models’.⁴³ This has led to the formation of centralized and standardized licensing platforms

³⁸ Rafiqi FA and Bhat IH ‘Copyright Protection in Digital Environment’ 2013 International Journal of Humanities and Social Science Invention Vol. 2(4) 11, available at <http://www.ijhssi.org/papers/v2%284%29/version-3/B240615.pdf> (last accessed: 29 December 2014).

³⁹ See Article 11 of the WCT.

⁴⁰ Article 12 of the WCT. This relates to information that ‘identifies the work, the author of the work, the owner of any right in the work’, or information relating to ‘the terms and conditions of use of the work, and any numbers or codes that represent such information’ and which is simultaneously ‘attached to a copy of a work or appears in connection with the communication of a work to the public.’ (Article 9 of the WCT).

⁴¹ Graber CB, Govoni C, Girsberger M and Nenova M (eds) *Digital Rights Management: The End of Collecting Societies?* (Staempfli Publishers Berne 2005) 43. Fragmentation refers to the traditional bundling of rights into reproduction, performance, communication etc. and the problem that this poses in the licensing of rights in the digital environment as users demand a *one-stop* copyright clearance system.

⁴² The *CISAC decision* was a decision of the European Commission in July 2008, which dealt with the compatibility of the system of reciprocal representation among EU CMOs, with EU competition law. See for the decision http://ec.europa.eu/competition/antitrust/cases/dec_docs/38698/38698_4567_1.pdf (last accessed 29 December 2014).

⁴³ See Mazziotti 2011 *Columbia Journal of Law & the Arts* *supra* note 23 at 770.

such as CELAS,⁴⁴ PAECOL,⁴⁵ DEAL,⁴⁶ PEL,⁴⁷ PEDL,⁴⁸ IMPEL,⁴⁹ ARMONIA⁵⁰ etc. Following the CISAC decision and these developments, the European Parliament and Council in 2014 passed a directive on collective rights management, with focused provisions relating to the multi-territorial licensing of rights in musical works for online use.⁵¹

(ii) Performing rights

14. **Performing rights** in musical works represent the most comprehensive form of the system of collective management in existence today, and indeed one of the oldest forms of collective management of rights.⁵² The expression ‘performing rights’ includes such rights as public performance, broadcasting and communication to the public in general.⁵³ These rights are provided for in Articles 11 and 11*bis* of the Berne Convention. Performing rights in musical works are sometimes termed ‘small rights’ to distinguish them from so-called ‘grand rights’, it being observed that small rights are those that, ‘as a rule, are managed fully collectively’, while grand rights are as a rule licensed individually.⁵⁴ Grand rights are essentially rights associated with music performed with or as part of a dramatic work in order to tell a story or as part of a story. This includes so-called dramatico-musical works, ballets, oratorios

⁴⁴ The Centralized European Licensing and Administrative Service, a joint initiative of GEMA (Germany) and PRS for Music (UK), involved in the licensing of the Anglo-American mechanical rights repertoire of EMI Music Publishing.

⁴⁵ The Pan-European Central Online Licensing, a wholly owned subsidiary of GEMA, involved in the licensing of the Sony/ATV Publishing repertoire.

⁴⁶ Direct European Administration and Licensing, which stemmed from an agreement between SACEM (France) and Universal Music Publishing Group.

⁴⁷ The Pan-European Licensing Initiative of Latin American Repertoire, which stemmed from a mandate given to SGAE (Spain) to represent the Latin American repertoires of Sony/ATV, Peer Music and South American CMOs.

⁴⁸ Pan-European Digital Licensing, in terms of which Warner Chappell entrusted the representation and management of its Anglo-American mechanical rights repertoire to a number of EU CMOs.

⁴⁹ Independent Music Publishers European Licensing, an initiative of the PRS for Music aimed at licensing the online and mobile mechanical rights repertoire of independent music publishers.

⁵⁰ An initiative of SACEM, SGAE and SIAE (Italy), representing the repertoires of these CMOs and those of Universal Music, Sony Latino, Peer Latino and SPA (Portugal).

⁵¹ Directive 2014/26/EU of the European Parliament and of the Council on Collective Management of Copyright and Related Rights and Multi-territorial Licensing of Rights in Musical Works for Online Use, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0026> (last accessed 26 November 2015). See in particular in this regard Title III of the Directive.

⁵² See Ficsor *Collective Management* supra note 19, at 37 para. 71.

⁵³ *Ibid* 39 at para. 76.

⁵⁴ Ficsor *Collective Management* supra note 19, at 38 para. 73.



and other choral works of a duration exceeding twenty minutes, operas, musical plays, revues, pantomimes etc.⁵⁵

15. It would be important to address the right of **communication to the public** a little bit more. This right is provided for in Article 11(1)(ii) in relation to performances, and in Article 11bis(1)(ii) in relation to broadcasts. It is clear however that in the Berne Convention this right relates to transmissions over wire or paths using a material substance (e.g. what is normally known as transmission in a diffusion service, including cable transmissions) and rebroadcasts made by a broadcaster other than the originating one. Seeing that the communication had to be a communication to a 'public', this would exclude modern interactive on-demand technologies such as the Internet, 'which often entail transmission of a selected work to an individual user on demand, so that it is received only by that single user, typically in the privacy of his or her home.'⁵⁶
16. The WCT has dealt with this issue by extending the communication right to include '*the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.*'⁵⁷ It would thus be important for national legislations to specifically provide for this new media communication right as the old broadcast and public performance rights are likely to fall short of being able to deal adequately with the challenges posed by new media technologies.⁵⁸ Questions have, however, been raised as to whether this digital communication right applies only in respect of 'streaming' or if it also

⁵⁵ The '20-minute' rule is often applied to determine if extracts or excerpts from a dramatico-musical work would be included within a performing rights license, or excluded. In this regard, performances having a total duration exceeding twenty minutes (when broadcast by television, and sometimes twenty-five minutes when broadcast by radio or performed otherwise than by broadcasting) are often deemed to be grand rights and thus not to form part of the performing rights license.

⁵⁶ Goldstein P and Hugenholtz B (3 ed) *International Copyright: Principles, Law and Practice* (Oxford University Press Oxford 2013) 335.

⁵⁷ Article 8 of the WCT. Emphasis added.

⁵⁸ In South Africa, the PRO SAMRO has particularly experienced difficulties in licensing new media users because of a lack of this new media communication right in the Copyright Act.

includes downloads. A number of jurisdictions include downloads while some (such as the United States and Canada) limit the right to streaming.⁵⁹

1.3.2 Audio-visual Works

17. It is important to again note that works protected as *cinematographic works* under Article 2(1) of the Berne Convention include not only those that are fixed in a film but also ‘cinematographic works of televisual and audio-visual works’, provided they are expressed by a process ‘analogous to cinematography’.⁶⁰ The definition of audio-visual works in the Film Register Treaty⁶¹ sheds some more light in this regard. Article 2 of this treaty defines an audio-visual work as ‘any work that consists of a series of fixed related images, with or without accompanying sound, susceptible of being made visible and, where accompanied by sound, susceptible of being made audible.’ Article 9(3) of the Berne Convention provides that a sound or visual recording is a reproduction for purposes of the Convention.
18. The provisions relating to the protection of audio-visual and other cinematographic works in international treaties is based on a complicated and sophisticated regime largely dependent on national legislation. The Berne Convention lays down the principles in this regard in Article 14 and Article 14*bis*. The main issue here borders on the question of who the owner of copyright is in respect of the cinematograph work Article 14*bis*(1) of the Convention provides that a cinematographic work is protected as an original work apart from any other work adapted or reproduced in it. The article then proceeds to indicate that the owner of the copyright in a cinematographic work shall enjoy the same rights as the author of an original work. The rights referred to above in respect of authors of musical works therefore also apply in respect of the owner of copyright in a cinematographic and/or audio-visual work. Article 14*bis*(2)(a) then provides that **ownership of copyright in a cinematographic work shall be a matter of the legislation of the**

⁵⁹ See for example the recent ruling of the Supreme Court of Canada (SCC) in *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada* 2012 SCC 34. The position that communication to the public applies in respect of streaming was expressed in another judgement of the SCC delivered the same day, namely *Rogers Communications Inc. v Society of Composers, Authors and Music Publishers of Canada* 2012 SCC 35. In the US, the position that a download does not amount to a public performance was made in a decision of the United States Court of Appeals, Second Circuit, *United States v ASCAP*, Nos. 09-0539-cv (L), 09-0542-cv (con), 09-0666-cv (xap), 09-0692-cv (xap) (Sept. 28, 2010). In 2011 the US Supreme Court refused to grant ASCAP’s petition to overrun the decision of the Second Circuit, in essence making the decision of this court to stand. See <http://title17.net/archives/209> (Accessed 29 December 2014).

⁶⁰ *Guide to the Berne Convention* supra note 6 at 15.

⁶¹ The Treaty on the International Registration of Audio-visual Works adopted at Geneva on April 18, 1989.



country in which the protection is claimed. In view of this, different regimes apply in different countries as to who the owner of copyright of an audio-visual work is.

19. Generally the author of an original work that is adapted or reproduced in a cinematographic work has a right to authorize such adaptation and reproduction, as well as the distribution, public performance and communication to the public by wire of the works so adapted or reproduced (Article 14(1)). Furthermore, where the cinematographic work is itself adapted into any other artistic form, authorization is required not only from the author (or owner) of the cinematographic work but also from the authors of the original literary or artistic works from which the cinematographic work was derived (Article 14(2). In particular, the regime for compulsory licenses that applies in respect of *cover versions* of musical works does not apply in respect of cinematographic works (Article 14(3). In terms of Article 14*bis*(2) (b) however, national legislation may provide that the authors of any of the works contributing to the making of the cinematographic work are to be included among the owners of copyright in the cinematographic work. Under such circumstances such authors may not, apart from a contrary or special stipulation, object to the reproduction, distribution, public performance, and communication to the public of the work, or the subtitling or dubbing of the texts of the work. This is the so-called *presumption of legitimation*.⁶²
20. It is for the country in which the maker of the cinematographic work has his headquarters or habitual residence to determine, by legislation, the manner in which the presumption of legitimation is to be expressed (i.e. whether in a written agreement or a written act). However, the country in which protection is sought may, by legislation, enact that the presumption shall be of no effect if it is not in a written agreement or a written form (Article 14*bis*(2)(c)). This position applies where the national legislation recognizes authors of literary and artistic works that contributed to the making of the cinematographic work as co-owners of the cinematographic work. However, even where the presumption applies, it shall not, unless national legislation provides otherwise, apply in respect of 'authors of scenarios, dialogues and musical works created for the making of the cinematographic work', or the principal director of the work concerned (Article 14*bis*(3)). Where national legislation does not make the presumption to apply in respect of the principal director (e.g. countries that treat the director as an employee), this position must be notified to the Director-General of WIPO by written declaration, to be communicated to all other member states.

⁶² See *Guide to the Berne Convention*, supra note 6 at 86 – 87.

21. Put simply, there are three different legal regimes applicable with regard to the ownership of cinematographic works: (i) the ‘film copyright’ system where the maker of the film (other than the producer, director etc.) is the first owner of copyright in the film, but where the rights in respect of stand-alone works that contributed to the making of the film (i.e. scripts, music, scenarios etc.) remain completely with the authors of such works and must be acquired by the filmmaker by contract (either express or implied); (ii) a system where the film is considered to be a work of joint-authorship between the various persons who contributed artistically in the making of the film, from whom the filmmaker must acquire assignment to use the film; and (iii) the ‘legal assignment’ system, where the cinematographic work is treated as a work of joint authorship but where national law presumes the existence of a contract with the filmmaker assigning a right to exploit the work.⁶³
22. From the above, it is clear that the market for the administration of audio-visual rights internationally is fragmented (i.e. not uniform). It is important to understand the system that is applicable in one’s country before establishing a CMO in the area of audio-visual rights, in particular to be able to understand the rights holders that the CMO must represent and the market in which the CMO intends to be involved. In jurisdictions with a strong emphasis on authors’ rights, the trend seems to support the recognition of the various artistic contributors to the cinematographic work (e.g. director, scriptwriter and sometimes also the music composer and other creative technicians) as co-authors of the cinematographic work. This position is particularly so in the European Union, where all EU Member States now recognize the principal director of a film or other audio-visual work as an author of the work, according to him or her the associated intellectual property rights. This is in line with the 1992 EU Directive on the Rental and Lending Right and Certain Related Rights. Member States, however, remain free to use national law to designate other co-authors.⁶⁴ On the other hand, in many common-law jurisdictions such as the US, the ‘film copyright’ system appears to prevail,

⁶³ See generally in this regard *Guide to the Berne Convention* *ibid* at 82 – 89.

⁶⁴ See in this regard http://europa.eu/rapid/press-release_IP-02-1824_en.htm?locale=en (last accessed: 28 November 2015). Pursuant to this directive the United Kingdom, though traditionally a common-law jurisdiction, promulgated the Copyright and Related Rights Regulations of 1996, which designates both the producer and principal director as co-authors of a film, in essence making a film a work of joint authorship. See Kamina P Film Copyright in the United Kingdom (Cambridge University Press Cambridge 2004) at 140 – 141.



with the producer being recognized as the author of the audio-visual work.⁶⁵ In respect of works contributing to the audio-visual work (e.g. the script, underlying musical works etc.), a buy-out of rights is prevalent where the producer makes an up-front payment with no further obligation to pay any other form of remuneration.⁶⁶ This system is based on private negotiation between the parties. However, in certain situations works created to contribute to the audio-visual work may be deemed to be commissioned works or 'works-made-for-hire', the copyright of which would then belong to the party commissioning the work.⁶⁷

23. On the other hand, in jurisdictions that recognize the co-authorship of the various contributors to the film, sources of remuneration for the contributors may vary from public performances of the film in cinemas etc.; television broadcasts and cable rebroadcasts; private copy royalties;⁶⁸ lending and rental rights; video sales; video-on-demand; educational uses etc.⁶⁹ Some of these usages are based on exclusive rights while others are based on remuneration rights. In Europe, the Society of Audio-visual Authors (SAA)⁷⁰ has been at the forefront of advocating for the rights of audio-visual authors (in particular scriptwriters and directors). Persons intending to start an audio-visual CMO must ensure that national legislation clearly provides for a system of remuneration of rights holders (whether statutory or voluntary), and that this must be in respect of distinct usages of the audio-visual work. The remuneration must be paid to all participating rights holders, ideally proportionate to their contribution to the cinematographic work. The legislation concerned must also clearly provide for the collective

⁶⁵ The UK, as part of the European Union, is a notable exception in this regard. Pursuant to the 1992 EU Directive on the Rental and Lending Right and Certain Related Rights, the United Kingdom promulgated the Copyright and Related Rights Regulations of 1996, which designates both the producer and principal director as co-authors of a film, in essence making a film a work of joint authorship. See Kamina P Film Copyright in the United Kingdom (Cambridge University Press Cambridge 2004) at 140 – 141.

⁶⁶ The composer of musical works incorporated in the film (and the writer of lyrics associated with such works) may, through his CMO, be compensated for the public performance of the musical work when the film is performed in cinemas and when it is broadcast on television.

⁶⁷ In the United States a work-made-for-hire includes a work created within the scope of a person's employment as well as works 'specially ordered or commissioned' for use as a contribution to a number of identified works (which includes works used as part of a motion picture or other audio-visual work), provided that the parties have agreed in a signed, written agreement that the work shall be considered a work-made-for-hire. See 17 U.S.C. § 101.

⁶⁸ Where a private copying exception is in existence.

⁶⁹ See further in this regard a booklet of the Society of Audio-visual Authors (SAA) titled *Royalty Distribution Rules and Practices*, available at http://www.saa-authors.eu/dbfiles/mfile/4800/4877/SAA_Audiovisual_Royalty_Distribution_Rules_and_Practices.pdf (last accessed: 30 December 2014).

⁷⁰ See <http://www.saa-authors.eu/>.

management of audio-visual rights in order to ensure that the interests of rights holders are adequately safeguarded.

INITIAL MARKET ASSESSMENT AND CONSIDERATION OF OTHER KEY ENVIRONMENTAL FACTORS

24. After ascertaining the position with regard to the legal and regulatory environment dealt with above, and after taking whatever action is necessary in this regard, it is important to conduct an initial assessment of the broader environment in which the new CMO will operate (the so-called ‘initial market assessment’). This activity involves analysing some key environmental factors. These factors include (a) the history of collective management in the country; (b) economic and market factors; (c) technological factors and (d) socio-political factors. This is an exercise that would normally be carried out by the ‘promoter group’, i.e. the group of persons who have conceived the vision of forming a new CMO, ideally with the assistance of business planning and strategy specialists. At this stage, only a preliminary consideration of these factors is made, with the more complete analysis being conducted at the stage of developing the CMO’s Start-Up Plan Development (see from paragraph 47 below).

1.4 The history of collective management in the country

25. Before taking a decision to start a new CMO, it would be important to consider if there is any existing form or history of collective management in the country. Are any CMOs already in existence in the country? Much can be learnt from the experiences of others and this can help with avoiding pitfalls. Having said this, if there is one or more functional CMO already in the area of authors’ rights, it would not be wise to re-invent the wheel. A better option would be to strengthen the operations of the existing CMO in order to make it more effective.⁷¹ The existence of factions (particularly in voluntary systems) in one area of rights administration has proven to give rise to problems. This can stifle efforts to have a functioning system of collective management of music rights in the country. It has often been stated that having one CMO to represent one bundle of rights or one group of rights holders is an optimum way of administering rights.⁷² The fragmentation of rights of one category among different CMOs may result in a situation where user groups take advantage of the situation, resulting in them arguing that none of the CMOs has enough representation of rights holders to

⁷¹ In which case the discussion under Unit 2 below will be applicable.

⁷² See for example Ficsor M *Collective Management of Copyright and Related Rights* (WIPO Geneva 2002) 135 – 136.



necessitate procuring a blanket license in a specific area of rights.⁷³ This may result in users electing to deal directly with rights holders on a transactional basis, or encouraging rights holders to deal directly with them – a practice that defeats the purpose and advantage of collective management. It may also expose rights holders to exploitation or pressure from users to accept lower licensing fees because of the lack of bargaining strength that a fully representative CMO has in balanced licensing negotiations.⁷⁴

26. If there was at one stage a CMO in the area of the authors' rights concerned which is no longer in operation, it would be important to carefully consider the reasons for the CMO's failed operations so as to avoid making the same mistakes. Furthermore, if other CMOs exist in other areas of rights, it would be important for the promoter group to form a working relationship with them. Other than being able to obtain information regarding market conditions, it may also be possible, during the nascent stages of the new CMO, to receive certain 'back-office/technical' support from the existing CMO in such areas as assistance with the formulation of tariffs and license agreements; assistance with royalty administration (where the new CMO may outsource this function to an existing CMO until such time as it has set up its own systems) or even 'front-office' operations such as membership/works declaration and similar. Support by an existing CMO may enhance the new CMO's standing and give it the early legitimacy required in dealing with users, government etc. Having indicated this, since the system of collective management is generally more developed in the area of authors' rights (particularly the rights of authors of musical works) than in other areas, it is not likely that CMOs in other areas would have preceded the CMO in authors' rights.⁷⁵ It is also important to mention the fact that in some countries a single CMO administers both performing and mechanical rights.

⁷³ It is noted that the system of collective management works best through the use of blanket licenses, which is what makes the system attractive to users. A blanket license is a license issued by a CMO permitting the user, during the term of the license, to use any one of such works or performances without the need of procuring an individual or transactional license for such usage.

⁷⁴ In some cases rights holders may also be pressurised to completely transfer their rights to the user through assignment or a buy-out arrangement in return for a meagre, or what may appear to be a generous, albeit one-off, payment. While legislation often prohibits a performer from assigning his remuneration right to anyone other than a collecting society (see for example section 182(D)(2) of the UK Copyright, Designs and Patents Act, 1988), some local legislations do permit a general assignment.

⁷⁵ Unless perhaps a CMO in the area of reprographic rights (i.e. the rights of authors and publishers of literary works) may already be in existence.

This is not dependent on whether the CMO concerned is in a developed or developing country.⁷⁶

1.5 Economic and market factors

27. It would be important to consider the economy of the country (i.e. the general state and health of the economy in relation to GDP – both nominal and per capita). If the state of the economy is not very positive and there are not many music-using businesses active in the economy, this may have implications for the existence of a fully-operational CMO. Often during economic slowdowns businesses cut down on expenses that they may deem to be inessential to their operations, and this may include the use of music. Under such circumstances, it would be important for the CMO (or in this case, the promoter group) to ‘sell’ the idea of the value of music in business in order to get businesses interested. It may also be necessary to give users some incentives to take a music license, such as offering rebates or charging incremental license fees that make it easy for the businesses to benefit from the use of music without feeling unduly strained financially. It is, however, also important to note that even during periods of economic slowdown some businesses that claim not to be using music may in fact be doing so undercover. It is thus important to build a team of effective licensing representatives that can visit business premises and collect information and, where applicable, evidence of the users’ unauthorized usage of music for the purposes of any legal proceedings. Identifying one flagrant infringer and taking it to court successfully is likely to send a message to other infringers that they need to procure a music license.
28. In addition to assessing the general state of the economy it would also be important to do a thorough *market potential assessment* in respect of various types of **music usages**. The assessment is aimed at estimating the size of the market in order to determine the potential licensing income that will be received from licensing users. In this regard, it must be noted that intellectual property rights are often in the form of a ‘bundle of rights’. This means that the protection afforded to a musical or audio-visual work is often not granted in respect of one exclusive act alone but in respect of several exclusive acts. This was dealt with above when discussing the legal and regulatory environment. The market potential assessment must therefore determine, in respect of all possible usages of the work concerned, what the potential market is for the usage of the work. Thus in respect of

⁷⁶ Thus for example GEMA (Germany), SACEM (France) and JASRAC (Japan), in the developed world, and several societies in the developing world (e.g. MCSK in Kenya, MSCN in Nigeria, SACM in Mexico and SCD in Chile) administer both performing rights and mechanical rights.



both musical works and audio-visual works, one would within each area of exploitation – e.g. broadcasting; communication to the public etc. – need to consider the major forms of usages in the particular area (e.g. terrestrial broadcasting; cable broadcasting; satellite broadcasting; webcasting and other forms of digital broadcasting – including that by telecommunication companies, Internet Service Providers, digital service providers etc.). It would also be important to distinguish between major users (such as public and commercial broadcasters) and smaller ones. In the public performance area, the consideration would include major users in the accommodation sector (hotels, resorts, lodges etc.), hospitality sector (restaurants, pubs, clubs etc.), retail sector (supermarkets, specialized retail etc.), entertainment sector (cinemas, concert promotions etc.) etc.

29. The reason for this is that the larger users are often the ones sustaining the operations of a CMO because they contribute the highest percentage of licensing income. They are also often more reliable than the smaller users and contribute a more steady and permanent form of licensing income. Smaller users may 'come and go', as statistics confirm that about half of start-up businesses do not go beyond their fifth anniversary.⁷⁷ For this reason, it would be important to maintain a very close and amicable relationship with major users, as much as is possible. They should not be seen as enemies but indeed as partners in ensuring the welfare of rights holders, and this fact should be communicated to them as much as is possible. It may also be useful to have a dedicated 'account executive', who will be the direct link or liaison between the CMO and the user, ensuring customer satisfaction as well as making sure that any disputes or potential disputes are 'nipped in the bud'.
30. It is also important to note that the market for mechanical rights administration has become diversified over the years and particularly since the advent of digital exploitation. The traditional market is concerned with phono-mechanicals and broadcast mechanicals. In this regard, the extent of development of the recording, publishing and broadcasting industries will greatly determine to what extent a market exists for mechanical rights in the country concerned. In civil-law jurisdictions, phono-mechanicals have generally been administered collectively,⁷⁸ while in common-law jurisdictions copyright owners have traditionally licensed the reproduction of new works, with collective management being used under the compulsory licensing

⁷⁷ See <http://www.businessdictionary.com/article/492/deciding-when-to-call-it-quits/> (accessed 23 September 2014). In the US, the Harry Fox Agency, a mechanical rights CMO, also administered synchronisation rights until 2002.

⁷⁸ That is, until the CISAC decision, which gave rise to a proliferation of new, customised forms of collective management in the online and digital environment, as dealt with above.

system (in respect of the licensing of ‘cover versions’). Furthermore, as indicated above, not all countries make provision for broadcast mechanicals and it would therefore be important to determine what the law of the country in which the CMO is to be established provides in this regard (or to influence the law according to rights holders’ aspirations, if possible). It also needs to be noted that the licensing of broadcast-mechanicals, where this exists, involves not only normal commercial works but more importantly, the licensing of so-called *library music* (also termed ‘production’ and ‘mood’ music) and in some instances, the use of commissioned works, where authors are specifically commissioned to create music for television programs. The potential market assessment needs to determine to what extent a market exists for all such usages.

31. Over the years, the licensing of reproduction rights in music has extended to such unconventional or specialized areas as theme albums, corporate training material, mail order material, audio books, music boxes and telephones, door chimes, toys and dolls etc. The print market is also another important market to consider. This involves issuing reproduction licenses in respect of the use of musical works by means of sheet music and other song books (including music folios), usage in other literary works (e.g. novels, music and news magazines etc.), music books based on film music or stage musicals, lyrics on CD and cassette packaging, lyrics on clothing items and posters, music incorporated in greeting cards, board games, soda cans etc. Whether any of these usages are licensed through collective management or by the rights holders themselves is something that will be dependent upon the culture of each country. In the new media environment, mechanical rights licensing applies in respect of the use of music in ringtones/ring-back tones, digital downloads etc.
32. The administration of audio-visual rights will be dependent upon the system applicable in the country concerned, as dealt with above under the legal and regulatory analysis. Apart from the market for public performance, broadcasting and communication to the public dealt with above, the market for synchronization rights will be largely dependent upon the development of the motion picture, advertising, television, video game and home video industries in the country concerned. There is no uniform practice in relation to the administration of synchronization rights. Though rights holders would generally administer these rights themselves, there are many instances where these rights have been administered collectively by CMOs.⁷⁹ In the new media environment, many opportunities have availed themselves to

⁷⁹ See in this regard Ficsor Collective Management *Collective Management of Copyright and Related Rights* 57 at para. 128.



rights holders, such as the video-on-demand market. This may involve the *streaming* of videos or television programs on the basis of pay-per-view or free content,⁸⁰ accessed using a set-top box, a computer or other device, or in the form of Internet television, in-flight entertainment available in some airlines etc. The videos may also be accessed through *downloads*, either to a computer, digital video recorder (DVR) or other portable media player. The system of private copy which compensates rights holders for the limitation of their exclusive rights by allowing limited copies for private use, is also an important source of income for audio-visual rights holders, where this exists.⁸¹ Other specialized usages exist, such as the licensing of corporate videos and video games. Some jurisdictions also provide for a rental rights in respect of audio-visual works, which can be an important source of income. All of these considerations need to be taken into account when making the initial market assessment to determine the potential of implementing a successful collective management system.

33. In addition to identifying potential users, the market potential assessment must also determine the **potential rights-holder market**, in order to determine the CMO's potential repertoire. The extent to which a voluntary CMO can issue usage licenses is largely dependent upon the CMO's repertoire. In this regard it would, especially in the area of performing rights and mechanical rights, be important to have rights in respect of both domestic and pertinent international repertoire. Being able to represent major rights holders (composers, lyricists and music publishers), both locally and internationally (through reciprocal arrangements) can place the new CMO in a better position compared to any possible competitors. Major international publishers and some of the major independent publishers may have local affiliates in countries, or at least have relationships with existing national publishers that enable them to represent the rights of composers and lyricists in those countries. These local representative companies would join the CMO as members, thus giving the CMO access to broader international repertoire.⁸²
34. The identification of international repertoire also involves identifying similar CMOs in foreign jurisdictions, which will ensure reciprocal representation of the rights of the members of these CMOs. Reciprocal representation will be of particular benefit to composers, lyricists and independent publishers,

⁸⁰ The pay-per-view would be based on a subscription system, while in the free content access systems the platforms earn their income by selling advertisements. See in this regard http://en.wikipedia.org/wiki/Video_on_demand (accessed 14 January 2015).

⁸¹ This is equally correct in respect of audio recordings.

⁸² It is acknowledged that in some jurisdictions publishers may, in the area of mechanical rights, prefer to administer the rights themselves or through entities specially assigned to do so and not through the conventional collective management system.

who may not have the resources to control the use of their repertoire internationally. The foreign CMOs then collect royalties on their behalf and send them to the local CMO for re-distribution to their own members. Even in the case of mechanical rights where the rights may, in some jurisdictions, be controlled by the publishers themselves, the publishers can benefit from reciprocal representation in jurisdictions where they do not have local affiliates or representatives. In this regard, it is however important to note that national legislation sometimes prohibits the payment of royalties to nationals of countries which do not provide reciprocal protection to the nationals of the other country.

35. As shown above, there is no uniformity regarding the question as to who is recognized as an author in respect of audio-visual works. Generally in civil law jurisdictions, the screenwriter and the director are recognized as authors, while in common law jurisdictions it is the producer who is normally recognized the author. However, it is common (particularly in civil law jurisdictions) to consider other parties as co-authors of an audio-visual work, such as music composers, cinematographers, designers and editors.⁸³ It would be important to determine what the laws of the particular country provide for in order to ensure that the correct rights holders (or potential rights holders) are approached or to influence the change of laws to achieve the desired outcome. The market potential assessment will enable the promoters and management of the new CMO to identify the relationships and partnerships that it needs to forge in order to operate successfully. The promoters may, even before the formal registration of the new CMO, start having preliminary exchanges with the major rights holders, users, and foreign CMOs, with a view to reaching an agreement in principle.⁸⁴

1.6 Technological factors

36. It would be important to also analyze the technological factors that would have an impact on the operations of the new CMO. These factors can either be *external* or *internal*.
37. **External factors** in this regard will include: the state of the telecommunications regulatory environment in the country concerned (e.g. the extent to which the frequency spectrum is regulated); bandwidth development; the availability of broadband and other Internet access

⁸³ See SAA White Paper ‘Audio-visual Authors’ Rights and Remuneration in Europe’ at 9, available at http://www.saa-authors.eu/dbfiles/mfile/1900/1913/SAA_white_paper_english_version.pdf (accessed 14 January 2015).

⁸⁴ The parties may, for example, conclude a memorandum of understanding (MOU) in this regard.



methods; general per capita access to personal computers and other technological devices (e.g. cell phones, iPods, tablets) and any other factors having an impact on the licensing of on-line music services. These factors will, for example, determine to what extent a market exists for the dissemination of musical and/or audio-visual works through broadcasting and other telecommunication networks – i.e. to what extent these works are used through radio and television (both terrestrial and digital); cellular networks, Internet Service Providers, and the like. They will also determine the ease with which the end-user can access such services. Where broadcast mechanicals are recognized the existence of such broadcasting and telecommunication networks would also enhance the market for the broadcast mechanicals. In an era where the sales of physical recordings continues to decline, the existence of an adequate digital infrastructure as well as good broadband speed is crucial for the development of a thriving phono-mechanicals market. This applies equally in the case of the home video sales, video-on-demand and video rental markets.⁸⁵ In the case of mechanical rights, this will not only facilitate easy access to music through digital downloads but also enhance and facilitate the actual production (and distribution) of music, which is increasingly dependent on the use of certain music software packages. It also needs to be noted that the large volumes of copyright works downloaded at any given time means that digital service providers often find it difficult to submit accurate or adequate usage reports. Under such circumstances, the engagement of media monitoring companies (such as BMAT⁸⁶, Tunesat⁸⁷ and others), which can be used to monitor both airplay and Internet usage, may be useful.

38. Furthermore, because of the ‘debundling’⁸⁸ of rights in the digital environment, the digital service provider may experience problems in accounting properly to rights holders. Thus in the case of a musical or audio-visual work, where streaming (constituting a communication to the public)

⁸⁵ See in this regard <http://variety.com/2014/biz/news/digital-sales-show-biggest-home-entertainment-gains-in-2013-1201033986/> where this trend is observed. (Accessed on 15 January 2015).

⁸⁶ <http://www.bmat.com/>.

⁸⁷ <https://tunesat.com/tunesatportal/home>.

⁸⁸ Copyright is often defined as comprising a ‘bundle of rights’, which means that it often makes provision, in respect of each work, for two or more separate exclusive acts that the rights-holder has the right to exploit or to authorize others to do so (e.g. reproduction and performing rights in musical works). These bundled rights have often been owned by different rights holders and licensed separately traditionally. However, in the digital environment, though still owned by different rights holders, the exploitation of the rights often takes place at the same time (e.g. a download, which comprises a reproduction, and streaming, which comprises a performance or communication to the public). This is what is meant by the expression ‘debundling’. See further in this regard Towse R and Handke C ‘Regulating Copyright Collecting Societies: Current Policy in Europe’, available at <http://www.serci.org/2007/towsehandke.pdf> (Accessed on 15 January 2015).

is followed by a download (constituting a reproduction and sometimes a communication to the public also), the user may, in the absence of an agreement between rights holders, find it difficult to know how much to pay each of the rights holders. It would thus be important for rights holders to reach agreement as to the share payable in respect of mechanical rights vis-à-vis performing rights in order not to impose reporting burdens on the user. In most of Europe for example, the splits vary from 75% for mechanical rights and 25% for performing rights, to a straight 50/50 split for 'à la carte downloads' and 75% for performing rights and 25% for mechanical rights, to a straight 50/50 split, in respect of 'on-demand streams', with the Nordic countries using a 70/30 split respectively. Of course, this will also depend on whether a download is considered to constitute only a reproduction or both a reproduction and a performance. The matter gets more complicated in relation to so-called 'tethered' or 'cached' downloads.⁸⁹

39. **Internal factors** also need to be considered. Central to this is the CMO's ability to use computers and networks to license uses and process data in a quick and seamless manner. Much in this regard hinges on the availability of and accessibility to computer systems capable of processing the voluminous data that a CMO needs to process on a daily basis, especially in the digital environment. The computer technology required to effectively run the operations of a CMO can be costly to develop. There is also the human resource consideration of availability of software developers who are fully acquainted with the business of collective management of authors' rights. The CMO may therefore face significant costs to obtain such services, or else license software systems from other existing authors' societies. The extent to which sharing/transfer of technology is possible also needs to be considered. It would be advantageous in the end for the CMO to have its own in-house services and expertise in this regard. A CMO needs to have access to reliable and automated systems that can be used to process the many layers of data it works with on a daily basis.

1.7 Socio-political factors

40. The socio-political analysis involves an assessment of the social and political environment in which the new CMO will be operating. On the **social** side, it would be important to assess the cultural environment in which the works concerned (whether musical works or audio-visual works) are created,

⁸⁹ See in this regard <https://musicandcopyright.wordpress.com/2012/07/25/big-differences-in-splits-for-digital-music-performance-and-mechanical-rights-in-eu-27/> (Accessed on 16 January 2015).



produced, performed or exhibited, and enjoyed; attitudes towards the respect of intellectual property rights; the rights holders' own levels of

41. knowledge about their rights; the average age of rights holders⁹⁰ etc. It would also be important to identify the various cultural associations, unions and arts-supporting organizations that exist, since it may become necessary to work with these organizations in the advancement of collective management. For example, the CMO may need the support of these organizations when lobbying government for new laws or revised regulations; when launching anti-piracy campaigns; or even as a recruitment base for new members. Some industry organizations in fact play a direct role in the creation of CMOs, thus becoming the main 'promoter group'. For example, the Harry Fox Agency in the United States was formed by the National Music Publishers Association (NMPA) in 1927.
42. On the **political** side, the considerations include relations with government, particularly government's attitude towards the creative industries and intellectual property protection; the speed of government's response in respect of policy and legislative amendments etc. Also included is an assessment of the regulatory framework within which the new CMO will be operating (e.g. what operating license will be required, any restrictions on conducting CMO activities etc.). To ensure that the new CMO operates without hurdles, it may be important to 'obtain the support' of government by forging relations with relevant government departments (e.g. the Department of Economic Affairs or Trade and Industry, whatever the case may be; the Department of Arts and Culture; the Department of Justice etc.) This may require the promoter group to introduce themselves and their plans to key officials within these government departments in order to establish 'lines of communication'. This will prove valuable whenever it becomes necessary to communicate with government.

IDENTIFICATION OF THE 'PROMOTER GROUP'

43. We have alluded above to the 'promoter group'. What is this group? This expression is used here to refer to the persons or group of persons who first conceive the vision or desire to form a CMO in either musical works or audio-visual works. These may be a group of rights holders (e.g. publishers or/and composers and lyricists, or their representative bodies) who take it upon themselves to organize the rights holder community with a view to starting a CMO. It may even be persons who are not rights holders *per se*

⁹⁰ The age demographics of the rights holders may be an important factor in determining the sustainability of the operations of the CMO.

but who have an interest in the safeguarding of authors’ rights.⁹¹ This group might also provide the initial capital outlay for starting the new CMO,⁹² or their involvement might be limited to organizing the rights holder groups and leaving it to them to determine how the new CMO would be financed. The initiative may even be taken by government, for example officials from the Department of Economic Affairs, Trade and Industry, the Copyright Office etc. This may particularly be the case if the national legislation only provides for a statutory society or one that is part of the state administration.

IDENTIFICATION OF RIGHTS HOLDER GROUPS AND RIGHTS HOLDER SENSITIZATION

1.8 Identification of the Rights Holder Groups

44. The first priority of the promoter group is to garner as much support for the proposed CMO as possible. More importantly in this regard is to obtain a ‘buy in’ from rights holder groups, with whose support the CMO needs to operate. The success and effectiveness of any CMO is largely dependent upon the type and value of the rights that it represents. This is true with regard to both local and foreign rights.
45. In view of this, it would be important to clearly and strategically identify the rights holders, or ‘rights holder groups’ that the new CMO would want to represent. In the case of musical works enlisting the membership of the major and major independent domestic publishers as well as successful composers and lyricists would, of course, be the first port of call for any CMO hoping to have an influence in its market. The promoter group should not, however, solely depend on the ‘major players’ and such a strategy must only be seen as a short-term strategy. Anything can happen, leading to the CMO losing the membership of these major players. There is also no guarantee that the identified composers/lyricists will continue to have a prolific creative career. A strategy that combines the recruitment of the major players as well as younger, promising composers/lyricists and publishers will prove worthwhile in the long run. The same can be said in respect of the identification of audio-visual rights holders. Much depends on the market size and focus of the CMOs concerned, and in the case of audio-visual rights, who the law of the country concerned recognizes as rights holders. Furthermore, some CMOs may be formed to service ‘the majors’

⁹¹ For example, BMI (Broadcast Music Inc.), an American performing rights society, was formed by a group of broadcasters who felt that an alternative was needed to ASCAP (the existing society).

⁹² Whether in the form of outright grants or by securing loans from other parties or by way of guarantees.



while others may be formed to cater for the needs of the ‘independents’, or to cater only for one category of rights holders.⁹³ Perhaps a better strategy would be to open up the CMO’s membership to all groups, whether major or independent.

1.9 Rights Holder Sensitization

46. Having identified the rights holder group which the new CMO wishes to represent, the next step would be to *sensitize* these rights holders about the idea of forming a new CMO. It is important that things are done correctly from the outset to avoid disputes at a later stage. The rights holders must identify with the new CMO and sense that they have made a contribution to its formation. As part of the sensitization, workshops or other industry-wide meetings need to be organised, and the various rights holder groups need to be invited to these meetings. The purpose of the workshops in general will be to highlight the importance of working together through the system of collective management. Ideally the promoter group would already have had separate meetings or contact with (and at least have obtained preliminary support from) some or most of the major rights holder groups before conducting the broader workshops. This will ensure that the workshops are not disrupted through a visible lack of support from these important industry players. On the other hand, visible support from the major players is likely to inspire the confidence of the rest of the rights holder groups in the new initiative and prompt them to also express their support.
47. Depending on budgetary constraints, it would be ideal to involve experts (e.g. officials from international and intergovernmental organizations like CISAC, CIAM,⁹⁴ Writers and Directors Worldwide,⁹⁵ SAA,⁹⁶ WIPO etc.) to make presentations at the workshops. Some of these organizations may even be able to provide support grants to assist in the running of the workshops. It is also important to receive support from legislators/regulators, wherever this is

⁹³ This may be influenced by the existence of another CMO in the market. For example, if the market already has a society representing the major groups the promoter group may focus its effort on forming a society that will only represent the independents.

⁹⁴ CIAM (International Council of Music Authors) was created in 1966 with the purpose of promoting the professional, economic and legal interests of creators of music, and has affiliates in Europe (ECSA), South America (ALCAM), Africa (PACSA) and North America (NMCA). See further <http://www.ciamcreators.org/>.

⁹⁵ Writers and Directors Worldwide, an organization formed to, amongst others, support the cause of dramatic, literary and audio-visual authors as they lobby for fair rights, was established in 2014 after its name was changed from International Council of Dramatic, Literary and Audio-visual Creators (CIADLV). See further <http://www.writersanddirectorsworldwide.org/>.

⁹⁶ SAA (the Society of Audiovisual Authors) is an association of European CMOs representing over 120 000 film and television screenwriters and directors. See in this regard <http://www.saa-authors.eu/>.

possible. Inviting a key government official (e.g. the Registrar of Copyright) to the workshop can be viewed in a positive light and can ensure government support in the long run. Government may also be able to provide some funding in support of the sensitization workshops. Where the society to be formed is regulated by statute or one forming part of the state administration, the state may itself initiate the process and actually sponsor the running of the workshops. Indeed in such cases the promotion process might involve sending an official communication to the rights holder groups, inviting them to information or implementation sessions relating to the new CMO. In the case of societies that are public entities within the state administration, this may even involve the publication of a statutory notice inviting authors, publishers and (in the case of audio-visual rights, where applicable), producers to register as rights holders or beneficiaries.

INITIAL START-UP PLAN DEVELOPMENT

48. Having sensitized the various rights holder groups regarding the need for a (new) authors' CMO (whether in the area of musical works or audio-visual works), and having obtained general support in this regard, it will now be time for the promoter group to 'get down to work'. This involves developing a proper business plan and strategy for the new CMO, which will define the parameters and scope of operation of the new body. This process will ideally take place at a special strategy session organized by the promoter group. Ideally an experienced business strategy consultant will be invited to assist in the process. It would also be important to have representatives from the major rights holders to attend the session. This would demonstrate the fact that wide consultations took place before the CMO was formed. To be effective the plan will have to include some or more of the following components:

1.10 Legal Nature and Bundle of Rights Considerations

1.10.1 Legal Nature

49. As indicated above a CMO may be a private entity based on voluntary membership; a statutorily-regulated entity which may permit voluntary membership or provide for compulsory membership of all rights holders; or an entity forming part of the state administration (e.g. a unit within the Copyright Office). The legal nature of the CMO will be largely dependent upon the system applicable in each jurisdiction. Where the particular jurisdiction permits the formation of private or rights-holder driven entities,



these would normally be constituted as non-profit organizations.⁹⁷ The company-limited-by-guarantee has been used successfully in many Commonwealth countries. Trusts, foundations and other similar entities have also been used. In the case of statutorily-regulated CMOs, the regulations may provide for accreditation terms that are either more or less stringent. For example, the statute may only set minimum standards that a society has to comply with while permitting rights holders to decide how the CMO will be constituted. On the other hand, it may go to the extent of regulating how the CMO will be constituted and what its governance structure will look like. In the case of an entity forming part of the state administration, usually a legislative instrument or regulation will determine how the entity will function.

1.10.2 Bundle of Rights Considerations

50. The strategy session must also determine the bundle of rights that the new CMO will administer. Again, this will depend on what the legislation provides for. The bundle of rights applicable in respect of both musical works and audio-visual works was dealt with above under 'Legislative and Regulatory Environment'. It needs however to be noted that the fact that legislation makes provision for a particular bundle of rights *does not mean that the new CMO needs to administer all rights within the bundle*. It could be that for strategic reasons a decision is taken to limit the operations of the CMO to only one area of rights (e.g. broadcasting, communication to the public, private copying etc.).⁹⁸ Even within one area of rights, a decision may be taken that the new CMO will only focus on one aspect, e.g. digital exploitation instead of traditional forms of communication to the public.

1.11 Organizational Design, Structure and Governance

51. Organizational design has to do with how the different functions and operations of an organization can be integrated to ensure that the organization best achieves its goals and purposes. This will determine the organizational structure and governance of the CMO. An organization's structure is a hierarchical arrangement in which various roles, functions, powers and responsibilities in the organization are determined and managed. This then gives rise to the organization's governance system, i.e. 'the

⁹⁷ See, however, Article 3a) of the Directive 2014/26/EU of the European Parliament and of the Council on Collective Management of Copyright and Related Rights and Multi-territorial Licensing of Rights in Musical Works for Online Use, *supra*.

⁹⁸ It may be that an existing CMO already effectively administers rights in one area and it is therefore felt that rather than competing with the existing CMO, the new CMO will focus on another area.

framework of rules, relationships, systems and processes within and by which authority is exercised and controlled in corporations.’⁹⁹

52. Central to the corporate governance system is a board of directors or governors. The type of corporate governance system adopted by the new CMO will largely depend on whether the jurisdiction concerned is influenced by a Common Law system, a Civil Law system or other mixed systems. So, for example, in Common Law systems the board of directors is usually a *unitary* or *single board* appointed by shareholders (and in the current case, members of the CMO), which in turn delegates its authority to various levels and components of management usually led by a General Manager, Chief Executive Officer or Managing Director. In contrast, many Civil Law and some Asiatic systems provide for a *dual-board* system comprising of a supervisory board (elected by members) and a management board (appointed by the supervisory board). Another functionary whose role is becoming increasingly important in corporate governance discourses is the company secretary, whose main function is assisting the board in carrying out its duties.¹⁰⁰
53. An organization’s corporate governance system, which is generally reflected in its **constitution**,¹⁰¹ regulates the various relationships existing between: the company and its members, the company and the board, the members and the board, etc. The constitution deals with such matters as the objects of the organization, qualifications for membership, qualifications to be a director, meetings of members and directors, accounting matters, the dissolution of the business, etc. While the members of a CMO’s board have traditionally been appointed from members of the CMO, it has become common to include a certain component of ‘independent directors’ (i.e. persons who have no involvement in the music business) in the board, in line with developments in corporate governance. CMOs that are public entities or are otherwise regulated by statute may require the appointment of government officials in the board. The **governance rules**, which form part of the CMO’s constitution, generally include the CMO’s *Membership Rules* and *Royalty Distribution Rules*. The Membership Rules provide for such matters as qualifications for membership, election to membership, termination

⁹⁹ See the so-called *Owen Report*, i.e. the Report of the HIH Royal Commission (2003) in Australia, available at <http://www.hihroyalcom.gov.au/finalreport/index.htm> (date of access 05 October 2014).

¹⁰⁰ This includes organising board and company meetings; keeping minutes and other company records; making the board aware of statutory, legal and other regulatory compliance issues etc.

¹⁰¹ I.e. a company’s memorandum and articles of association (also called by other names, e.g. charter, memorandum of incorporation etc.), including the company’s **governance rules**.



of membership etc.,¹⁰² while its Royalty Distribution Rules determine the manner, basis, frequency etc. of royalty distributions; royalty rates/shares and the division of royalty collections amongst rights holders; the valuing of, or weighting attached to particular usages; and possibly the deduction of administration costs or commission fees by the CMO etc.

54. The role of the strategy meeting is to agree on the general organizational structure and governance of the new CMO. The actual constitution of the CMO will then be prepared by lawyers or other experts with expertise in corporate law.

1.12 Methodology of Funding and Finance

55. It will be important for the strategy session to carefully determine how the new CMO shall finance its operations. Especially in the early stages, the new CMO will require finances to cover start-up costs and operating overheads. The need for careful financial planning cannot be overemphasized, and this constitutes one of the overriding aspects of the new CMO's planning. If financial planning is not done correctly at this stage, it may impact the effectiveness of the CMO later. The CMO's board and management need to be cognizant of the main aim of a CMO – namely to administer the rights of its members at the most cost-effective level to ensure that the bulk of the CMO's collections are paid out to members as royalties.
56. If the CMO adopts reckless financial practices from the outset (paying high salaries; a bulging administration; recreational activities for staff; out-of-town meetings that could be effectively conducted in-town etc.), this is likely to create a culture where the CMO always struggles to achieve its objective of maximizing the interests of its members. Employee satisfaction goes hand in hand with member satisfaction. If there is member satisfaction, this should translate into employee satisfaction. The board needs to encourage and inculcate a culture of thriftiness and financial efficiency from the very outset.
57. The strategy meeting needs to determine where the initial funding of the CMO's operations shall come from. This funding strategy needs to have a horizon of at least three years as it will take that long to set up operations, commence licensing activities, collect licensing income from users and generate a surplus for possible distribution. If the CMO is a private entity, normally the funding will have to be sourced privately. The funding may come from one or more of the promoters or promoter groups in the form of

¹⁰² Related to the Membership Rules is the Affiliation Agreement with foreign societies, which determines the relationship between the CMO and these foreign societies, including the manner of representation of the repertoire of the other society, the frequency of royalty distributions, the CMO's administration fee etc.

a term loan. The loan may also be obtained from a lending institution,¹⁰³ or an existing local or international society. The state may also provide some seed capital to cover the start-up costs of a statutory society. Where the CMO is part of the state administration, the state will usually provide the funding, either in the form of term funding or a once-off budget allocation/grant, to be administered by the CMO. The CMO should strive to keep its overheads to a minimum. It is of course normal to expect a higher administrative cost to income ratio for the CMO as it commences its activities, improving over time as it starts licensing users and getting them to pay. In this regard, a phased-in approach in which the CMO works at steadily reducing its administration to a certain level should be implemented.¹⁰⁴ In all cases, thriftiness in the use of funds and budgeting is crucial. This will prevent the ‘pay-as-you-go’ syndrome prevalent among some collecting societies where lack of proper financial planning has resulted in the society operating in a deficit situation with poor (if any) distributions to members.¹⁰⁵

1.13 Operations Management

58. It needs to be noted that there is a difference between the role played by the board and that played by management. The board provides general, high-level oversight of the functioning of the CMO, determining the strategic direction and vision of the CMO. It ensures that the CMO operates in a sound, financially defensible manner and that its activities are sustainable. It is left to management, led by the General Manager (GM),¹⁰⁶ to attend to the day-to-day operations of the CMO. It happens at times that board members may be tempted to get involved in the day-to-day running of the affairs of the CMO. This should not be encouraged. Management should be allowed to carry out the day-to-day affairs of the organization without encroachment from the board. The board is there to provide direction and support. For

¹⁰³ The sourcing of funding from a lending institution where the activities of a start-up CMO whose performance has not yet been tested will often require collateral (security) for the loan, or require one or more of the promoters to stand surety. If the promoters would have secured an agreement-in-principle from one or more major users, or have acquired rights from major rights holders, this could be used in support of a loan application.

¹⁰⁴ Where regulations require a society to keep administration costs at a certain level it would be useful to communicate with legislators to permit such a phasing-in system, so that the stipulated cost level only becomes mandatory after a certain period. All in all however, the CMO can only deduct costs that are ‘reasonable and indispensable’. See Ficsor *Collective Management of Copyright and Related Rights* 147.

¹⁰⁵ Traditionally the CMO concept of ‘pay as you go’ has come to mean the financing of expenditures (without due foresight or formal planning) from current funds as and when they become available rather than structured financial planning (including grants or term borrowings), especially where start-up expenditure is needed (including capital expenditure).

¹⁰⁶ Who may also be called a Chief Executive Officer (CEO) or Managing Director (MD).



this reason, board meetings are conducted once after some interval.¹⁰⁷

Management must, however, assist the board in carrying out its duties by ensuring that the board is provided with all crucial information necessary to enable it to provide its oversight role.

59. The main areas of operations for a CMO are **membership** (having to do with the acquisition of rights to represent rights holders and their works); **licensing** (having to do with the setting of licensing terms and tariffs (prices to users), and issuing of licenses to users) and **distribution** (having to do with the collection of usage data from users and using the data to distribute royalties to members).¹⁰⁸ In view of these operational areas, a society will usually have the following departments (or a combination thereof): *membership department* (responsible for the *membership system* which keeps records of the members of the CMO and their various statuses); the *documentation department* (responsible for the *documentation system* which keeps records of the musical works/audio-visual works associated with various members and affiliated societies)¹⁰⁹; the *licensing department* (responsible for the development of tariffs and issuing of licenses to users and keeping the *licensing system*, which records information about licensees, the amounts due, prospective licensees and infringers); and the *distribution and music usage department* (responsible for processing music usage data from users, linking this to the information in the documentation system, with the surplus available for distribution and computing the distribution and issuing royalty distribution statements).¹¹⁰
60. It is also important to note that the systems that a CMO keeps will also depend on the rights that it administers. In the case of mechanical rights and audio-visual rights where *transactional licensing*¹¹¹ is, along with blanket licensing, possible (and sometimes required), the systems would need to adequately cater for this. This imposes further administrative burdens on the CMO. Likewise where the CMO is a joint-CMO administering two or more

¹⁰⁷ The norm is for board meetings to take place once in three months, when management presents the organization's operational reports to the board. Having said this, it may be necessary for the board of a new CMO to meet more frequently (e.g. once a month) to assist management while the CMO's operations stabilise.

¹⁰⁸ See generally in this regard Gervais D (ed) *Collective Management of Copyright and Related Rights* (2010) 6 – 10.

¹⁰⁹ The membership and documentation departments may be merged into one department, sometimes called the *membership and repertoire department*. However as the society grows bigger, it may be necessary to separate the two functions to ensure greater efficiency.

¹¹⁰ The music usage department may be part of the documentation department. The actual computation of royalties and processing of royalty statements may be done by the CMO's information systems department, using data received from the music usage department.

¹¹¹ I.e. licensing in respect of individual works, as opposed to blanket licensing which takes into account all the works in the particular CMO's repertoire and thus does not need to account for individual works.

categories of rights (e.g. performing rights and mechanical rights; mechanical rights and audio-visual rights; performing rights, mechanical rights and audio-visual rights etc.) the systems would need to adequately ensure that all the rights are administered effectively. Mechanical rights CMOs also need to adequately cater for cases where there are changes in catalogues (i.e. where the musical works within the repertoire of one publisher is acquired by, sold or otherwise transferred to another publisher) – an occurrence that is all so common in today’s environment. Where the CMO administering audio-visual rights also administers performing rights in musical works, it may be possible to cross-reference the audio-visual database with the performing rights database where this concerns the use of film music (either through public performance in cinemas, through television broadcasts etc.).

61.
- Apart from the above-mentioned departments, there are other support structures that are essential to a CMO’s operations, both in respect of its role as a collecting society but also its corporate role generally. These include the *finance section*; the *legal and compliance section*; the *human resources section*; the *information services section*;¹¹² the *marketing and/ or public affairs section*¹¹³ etc. It is often common to speak about ‘front office’ and ‘back office’ functions, with departments or sections such as membership, licensing/sales; marketing/ public affairs being seen as front-office functions, and departments or sections such as documentation, distribution, finance, legal and compliance, human resources etc. being seen as back-office functions. These various operational functions are carried out by management and other employees of the CMO and are not the function of the board, with the possible exception of lobbying where members of the board may be co-opted to support public affairs and lobbying activities. It is, however, not proper for the board to encroach into the day-to-day running of the organization unless management has displayed gross mismanagement of the CMO’s affairs (and then only for a limited time period whilst the CMO’s affairs are stabilized).

1.14

Time-based Development Stages/Phases for ‘Time to Market’

62.
- It is important for the business plan to incorporate a time-based developmental strategy that realistically takes into account the time that

112

Also called information technology (IT) or information and communication technology (ICT) section.

113

In established CMOs the marketing and public affairs roles are often separated, with the former focussing on communication that relates to projecting the image of the CMO and the latter focussing on building relations between the CMO and important institutions such as government, industry organizations, intergovernmental organizations etc. The latter often involves lobbying and public/stakeholder relations in general and may be part of the corporate legal role (which includes lobbying).



it will take for the new CMO to start issuing licenses and reach its 'break-even point'. Often organizations conduct their strategy plans over an initial period of three years. In this regard, a more detailed analysis of the *environmental factors* dealt with above (paragraphs 24 and following) needs to be undertaken. This will also determine the *human capital needs* of the new CMO. Much in this regard will depend on the rights that the new CMO represents. If, for example, the CMO represents all the 'major players', it may be easier and quicker to enter the market, issue licenses and start receiving licensing fees, since the bulk of the works used in the market are more likely controlled or owned by these parties. Wide-scaled licensing activities will, however, require many of the departments dealt with under operations management to be functional, thus requiring more staff. If, however, the new CMO only managed to secure fewer or less-lucrative rights, setting up several departments or sections all at once and appointing managers to head such departments may prove costly and would, in fact, not be a wise decision. Under such circumstances, it would be prudent to merge closely linked functions into single departments and to appoint fewer staff members initially undertaking a variety of tasks.

1.15 Basic Marketing and Communication including Member/Rights Holder/Owner Recruitment

63. Having dealt with the above matters, it would then be important to deal with issues relating to marketing the services of the new entity, and how this will be communicated. The word needs to go out there that a new CMO has been formed. The strategic session will need to identify the 'customers' that the marketing plan wishes to target, and must adopt a differentiated communications strategy using various platforms that will ensure that the message which the new CMO wishes to communicate is communicated effectively and to the right audiences. The marketing and communications plan must clearly show how the CMO will reach both key rights holders and users. A strategy for recruiting members to the organization needs to be devised which may involve rights holder associations, unions or similar representative bodies. The marketing and communications plan must not neglect to clearly reflect how 'messages' to other stakeholders (e.g. government; other music industry associations; other cultural industry organizations etc.) are to be expressed.

1.16 Licensing and other Core Operational Functions

1.16.1 Licensing

64. Based on the initial market survey, it would be important to then segment the user market and to estimate the size of the various segments in order to devise a licensing strategy that will focus on each of the various market segments. This market segmentation is based on the ‘bundle of rights’ applicable in respect of each class of rights (whether performing rights, mechanical rights or audio-visual rights) and the particular rights that the CMO concerned has elected to represent. The market segmentation will enable the team to prioritize those market segments that are likely to bring in significant licensing revenue, those that are likely to bring revenues quickly, as well as those that are less likely to resist licensing initiatives. More importantly, the segmentation will assist management in identifying the key tariffs that need to be developed as soon as possible in order to commence with licensing activities. It may be useful to send introductory letters to the identified major users/user groups informing them about the formation of the new CMO, the rights and rights holders it represents, the reasons for forming the CMO and the need to procure a license from the CMO in order to avoid infringement of authors’ rights. Ideally the letter must be accompanied by a more detailed information brochure written in easy-to-understand language, which clearly outlines the rights protected, the legislative framework relating to the protection of the rights and a ‘frequently asked questions (FAQ)’ section.
65. In the meantime, the organization needs to develop its major tariffs in line with the segmentation of the user market. Thus for example the broadcast market would be divided into radio broadcasting and television broadcasting. Within these categories the market would further be divided into public broadcaster, commercial broadcasters and community broadcasters. These may be further divided into terrestrial broadcasting, cable broadcasting and digital broadcasting, and tariffs will then be developed in respect of all of these aforementioned areas. The development of public performance tariffs could be undertaken in line with the earlier identified segments such as accommodation, hospitality, retail and transport segments, further separating the tariffs according to categories such as essential, necessary and background uses. Further, in the area of audio-visual rights tariffs would



be developed in relation to the rental market, film exhibitions (where this is applicable)¹¹⁴ etc.

66. The actual tariff development is often based on benchmarking, which takes into account national, regional, continental and international best practices. The unique local conditions applicable in the particular jurisdiction are important. Even where there is correlation with practices elsewhere, the tariffs still need to be adapted to the local conditions. Courts and copyright tribunals have often used a 'standard of reasonableness' to determine if a disputed tariff or license fee is acceptable. They seek to assess whether the licensing fee charged was reasonable under the circumstances. When doing international benchmarks, it would be important to assess the degree of correlation between those CMOs chosen for the best practice exercise and the new CMO's market and the value generally attributed to culture and cultural products in the market concerned.
67. As part of the licensing process, a *licensing system* needs to be developed, which must take into account the various stages involved or contemplated in approaching users with a view to getting them to obtain a license. A number of licensing platforms and methodologies may be used. So, for example, a *correspondence system* of standard letters may be used, where a series of letters are generated to prompt a user to procure a license, as soon as a licensing representative has visited the user's premises and made the user aware of the need to procure a license.¹¹⁵ The series of letters could commence with an introductory letter highlighting the need for a user to procure a license; followed by a reminder letter after thirty days, a more strongly worded reminder after sixty days and a final letter of demand after ninety days. Should the user not respond to the final letter of demand, the CMO may deem the user to be in infringement of the rights it represents. Appropriate steps can then be taken to commence infringement proceedings.¹¹⁶

¹¹⁴ It has in this regard been noted that theatrical exhibitions are managed collectively only in a few countries such as Spain and Poland. See 'Study on Collective Negotiation of Rights and Collective Management of Rights in the Audio-visual Sector' WIPO CDIP/14/INF/2, available at http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=283200 (Accessed on 15 January 2015).

¹¹⁵ Or as soon as CMO staff has somehow become aware of the fact that a particular premises use music, such as through information available in daily newspapers etc.

¹¹⁶ This system will also serve to place the user 'in guilty knowledge' in cases of *secondary infringement* of copyright, where the user may claim that he or she was not aware that the copyright works used constituted copyright infringement.

1.16.2 Other Core Operational Functions

68. Apart from licensing issues, attention needs to be given to other core operational functions, in particular **membership, repertoire documentation and music usage reporting**. Appropriate systems need to be developed in all of these areas. Developing such systems can be costly and start-up CMOs may find that it may be advantageous to make use of ‘off the shelf’ (or specially commissioned) systems¹¹⁷ or systems licensed from other CMOs. Societies may in due course develop their own ‘home-grown’ systems based on their own local needs. It must, however, be indicated that developing such systems requires expertise, technical input and is likely to be a costly exercise.
69. The **membership system** needs to accurately link a member’s name (or pseudonym) with all relevant information relating to that member, including their biographical information,¹¹⁸ all works, as well as past and current affiliations, when the rights-holder became a member etc. In the **documentation system**, the search is based on a work (i.e. a musical work or audio-visual work). Such a search must be able to indicate the current and previous persons associated with such a work. It is important to keep this database up-to-date at all times and ensure that it reflects all changes to the information in a timely manner. Equally important is the **works usage system**. If good usage information from users is sourced and not accurately or timeously linked to the correct rights holder, this may lead to significantly inaccurate distributions. Payments belonging to one member may be allocated to another, and a member may not be able to receive royalty payments on time. It is important to also understand that the usage information from users often comes in a ‘raw’ or unprocessed state and thus needs to be carefully researched and analyzed before a usage can be allocated to particular members. For this reason, staff involved in the research must undergo thorough training and where practicable electronic matching systems should be deployed. The information services function/unit plays a pivotal role in processing distributions. Staff in this unit have to process and merge information from various databases in order to accurately determine who should be paid in respect what usage. This involves linking music usage information to information in the revenue ‘pools’ and the works ownership information in the documentation system. This is a very technical activity which requires high levels of expertise.

¹¹⁷ WIPO has for example developed a software program, termed WIPOCOS, aimed at assisting CMOS to set up their operations. See in this regard http://www.wipo.int/edocs/pubdocs/en/copyright/957/wipo_pub_957.pdf (accessed on 06 October 2014).

¹¹⁸ In this regard it should be able to capture any changes to a member’s details in real time.



1.17 Prioritization of Administration Activities

70. It will be important for the new CMO to set up proper administrative processes from the outset. Any lapse in implementing proper administrative practices at any time is likely to prove costly for the CMO. In this regard, the keeping of proper records and reports is crucial. As the CMO commences activities, there will be a lot of data sourcing and processing. It will be important to ensure that the processing of all data is systematized and correctly channeled within relevant administrative functions or functional areas in the organization, thus avoiding wasted efforts by having to correct errors later. These functional areas include Finance, Human Resources, Legal and Compliance and General Administration. It will be important at all times to understand what type and level of data or information the organization is dealing with.
71. The **Finance** function is crucial to the proper functioning of any organization, not to mention a CMO. It can be argued that a CMO is essentially in a financial business because its main purpose is to collect and distribute royalties (and possibly other income) to rights holders. In this regard, it will be important to make informed decisions regarding setting up proper accounting systems and such matters as the layout of a chart of accounts, budgets, financial reports (statements of comprehensive income, statement of financial position, statement of changes in funds and reserves and statement of cash-flows) and their formats, debtors' reports & ageing, risk and internal control systems etc. An effective credit control policy and system that ensures that debtors are actively pursued to ensure payment is very important for the proper functioning of a society. It does not help to have a large debtor's book which is ageing without actually receiving payment. A CMO would soon run into difficulties if it distributes license fees it has invoiced but not collected. For more detailed information on Financial matters please refer to Unit 4 in this Tool Kit.
72. Similarly important is the **Human Resources** function. Employee needs and relations need to receive attention. A society is a service business and is thus also dependent on its human resources. Furthermore, because collective management is a specialist form of business which requires some unique and scarce skills, it is important to maintain a high level of employee retention and a continuing culture of skills development. The loss of 'corporate/institutional memory' through the departure of key employee/s can create a temporary, sometimes serious lapse in the operations of the CMO. Another equally important administrative section is **Legal and Compliance**. Apart from dealing with normal corporate legal functions, the Legal and Compliance section – which can either consist of one corporate

‘counsel’ in smaller CMOs or a full department in bigger CMOs – is integral to the core functions of a CMO. The unit assists with the drafting of licensing agreements, membership agreements/assignments, important licensing negotiations and dealing with infringement cases. The unit often carries out its duties in conjunction with external law firms and counsel. The CMO lawyer also provides ongoing legal advice to the society on many areas of general law. Part or all of the unit’s functions may also be outsourced to an external law firm/s, if this is seen as being more cost-effective. On the other hand, the **General Administration** function relates to such matters as procurement, office rental, building or general facilities management, transportation etc.

1.18 Decision/s on Ancillary Services

73. We have dealt above with a number of functions and activities that a society is involved with. It is, however, important that everyone is clear in their minds as to what constitutes the core services of a CMO, and what amounts to ancillary services. In terms of categorization and prioritization, it can safely be said that being *able* to (i) license users, (ii) collect license fees and (iii) distribute royalties to members constitute the core functions of any CMO. A CMO must be able to effectively and maximally perform all of these functions **at all times**. Other activities of the CMO are ancillary to those and their level of importance is dependent upon how they contribute to these three goals. A society’s management and/or board should avoid goals which detract from carrying out the CMO’s core functions. Having said this, ancillary goal/s may be justified *if they are a natural consequence of pursuing the CMO’s core functions*. A society might also be involved in some activities of a cultural or social nature (e.g. promotion of authors’ rights awareness in the wider business environment, ‘commissioning’ or providing financial support to create certain copyright works – e.g. specialized musical works; film scripts etc., and in certain CMOs, providing some type of social support). These also, while laudable, are not the core functions of a society and should only be pursued if doing so is a natural outcome of effective collective management and does not distract the CMO from carrying out its core activities.¹¹⁹

¹¹⁹ It can of course, be argued that some of these activities are a form of corporate social responsibility and that in this way, they enhance the corporate citizenry of the society, thus enhancing its legitimacy, ‘license to operate’ and general effectiveness.



1.19 CMO Assessment, Review and Quality Assurance Processes

74. Having worked on the initial business plan, it is important to note that a regular measurement of progress vis-à-vis the objectives set out in the business plan and the CMO's budget needs to take place. There needs to be monthly internal meetings in which various units/departments report on their progress and/or the difficulties they may be experiencing. The Assessment of Progress should be conducted at appropriate Management and Board levels. While the review of financial performance is crucial, the assessment should not be limited to consideration of narrow Financial Reports but must comprise a Review Process which can be divided into three sections, namely (i) General Financial Reporting – which is done against Approved Budgets, including relevant commentaries and observations on the CMO as a 'going concern'; (ii) Identification, Understanding and Consequences of Risk (and Opportunities), the measures introduced to Mitigate against potential and actual Losses while exploring these opportunities, Performance and effectiveness of the CMO's Internal Controls and Reporting Systems for deviations from set standards; and (iii) Integrated Sustainability Review further covering non-financial assurance relating to: Engagement of CMO Stakeholders, Matters of Health & Safety, the CMO's Impact on its wider Environment and lastly the Ethical Conduct of the CMO and its commitment to certain Codes and Standards of behavior.
75. Where progress is poor, management and the board need to indicate a clear path of remedial action and processes to address the deviations. A short annual review of the CMO's strategy implementation by way of sessions between the CMO's board, its management team and other essential staff would also be recommended.

REGIONAL AND INTERNATIONAL MATTERS

1.20 Affiliation

76. It is customary for CMOs to be affiliated with international, non-governmental federation/s formed to foster cooperation amongst the CMOs and to develop common standards and rules, amongst other objectives. In relation to authors' societies, CISAC¹²⁰ fulfills this role. BIEM¹²¹ is another important international authors' organization and represents mechanical

¹²⁰ International Confederation for Societies of Authors and Composers, based in Paris. See <http://www.cisac.org/>.

¹²¹ BIEM is the international organization of mechanical rights societies. Its full French name is Bureau International des Sociétés Gérant les Droits d'Enregistrement et de Reproduction Mécanique, and it is based in Neuilly-sur-Seine, France. See <http://www.biem.org>.

rights CMOs.¹²² CISAC maintains a Common Information System (CISnet) being a network of databases built upon CIS standards. It employs a variety of international standard identifying codes for musical works (ISWC), audio-visual works (ISAN) and rights holders (IPI, ISNI), and several tools and databases (CIS-Net, IPI System, AV Index, Agreements, etc.) for information exchange between its member CMOs and federations.¹²³

77. As mentioned earlier, in the area of musical works, CIAM, and in the area of audio-visual works, Writers and Directors Worldwide,¹²⁴ are important organizations and play a crucial role in providing cooperation, networking and support for authors of musical works and dramatic, literary and audio-visual works respectively. There is also the Association of International Collective Management of Audio-visual Works (AGICOA), a Geneva-based alliance of various organizations representing about 15,000 audio-visual works producers/distributors (or/and their assignees) in the area of cable, satellite, ADSL and related retransmission rights.¹²⁵ Together with the International Federation of Film Producers Association (FIAPF)¹²⁶ and CISAC, AGICOA founded ISAN_IA, an international agency responsible for the International Standard Audio-visual Number (ISAN), an ISO standard which provides a unique and voluntary internationally-recognized permanent identifier/reference number for audio-visual works and related versions registered in the ISAN system.¹²⁷

1.21 Support and Collaboration

78. The start-up society must forge good working relationships with other CMOs in its geographic region (where they exist) and internationally. This can result in the new society receiving *support* of various forms from these existing CMOs. The new society can benefit from the experiences and expertise of

¹²² BIEM has, over the years, negotiated a standard agreement with the International Federation of the Phonographic Industry (IFPI), the organization representing record producers, which fixes the conditions for the use of the repertoire of BIEM's member societies by record producers and is applied where no compulsory license or statutory license is in place. While BIEM accepts membership of only mechanical rights societies CISAC accepts membership of all authors' societies, including mechanical rights CMOs and those administering audio-visual rights. BIEM and CISAC collaborate in the safeguarding of authors' rights and interests.

¹²³ See <http://www.cisac.org/What-We-Do/Information-Services>.

¹²⁴ For CIAM see <http://www.ciamcreators.org/> and for formerly International Council of Dramatic, Literary and Audio-visual Creators (CIADLV). See <http://www.writersanddirectorsworldwide.org/>. Both organizations are based in Neuilly-sur-Seine, France.

¹²⁵ See www.agicoa.org.

¹²⁶ See <http://www.fiapf.org/>.

¹²⁷ See <http://www.isan.org/>. CISAC has been involved in the development of other systems and standards such as the well-known IPI (Interested Party Information) system, the CIS (Common Information System), the ISWC (International Standard Musical Work Code) etc.



existing societies in the form of technical advice; receiving a secondment of a person with expertise in a particular area to be stationed at the premises of the new CMO over a certain period for purposes of coaching staff, or conversely, sending staff from the new CMO on a 'learning mission' to one or more of the established societies, etc. The support can be in various areas relating to the Core Operations of the CMO.

79. Apart from receiving support, the new CMO can also *collaborate* with societies in other areas of mutual interest, such as the sharing of common repertoire; and forming collaborations with other national, international and multilateral agencies active in the field of collective management of authors' rights. In some regions, such collaborations have proved helpful to the success of the CMO in the long run.

CONVERSION OF INITIAL START-UP PLAN INTO FULL HORIZON PLAN

1.22 Monitoring and Review

80. The information in this Unit is informed by years of collective management observation, practice and experience. Constant monitoring and review of the CMO's progress, sometimes involving a 'trial and error' approach, must be undertaken until the CMO reaches its optimal level of operation. There are, however, certain tested principles that would apply to most CMOs and this commentary has thus taken into account a generalised situation as prevails in many countries. Variations exist and in some countries the progress of a CMO has been either quicker or slower, depending on domestic factors whether (Internal or External) with the effect of either advancing or reducing the 'time to efficient market' of the CMO. Some of these factors are mentioned below.

1.22.1 Internal factors

81. The internal factors in this regard include the actual quality of leadership of the board and management team vis-à-vis the contribution and skills sets required; the existence of domestic repertoire; 'support' for the CMO from domestic and foreign rights holders; the accuracy of certain initial assessments made by the Promoter Group and contained in the Environmental scans conducted – whether of a legal, economic, technological or political nature, etc.; and resourcing capital for the start-up and related factors.

1.22.2 External factors

82.
- External factors include societal views and/or perceptions, and the value placed on culture and in particular authors’ rights; perceptions about the progress of the CMO from rights holder associations, rights using groups and government; changes in environmental factors (as dealt with above), as compared to the initial market assessment and the like.

1.23 Plan Adjustment

83.
- What was said in the foregoing paragraph illustrates the fact that the results or outcomes of growth in a Start-up CMO may be variable, positive or negative. The situation would need to be evaluated to ensure that any of the CMO’s strengths identified are augmented, and any weaknesses are reduced or possibly eliminated. Where a start-up plan may have envisaged a particular time frame for the delivery of the CMO’s core services, this may have to be adjusted with reference to realities faced by the CMO. This in turn may result in longer or shorter *time horizons* for the delivery of particular goals and objectives. This and other related issues are dealt with in some depth in Unit 2 of the tool kit, and it is suggested that when the promoter group commences the initial start-up strategy session they should do so with an understanding that the plan can only deal with considerations relating to a start-up CMO and that at some stage it would need to be converted into a full horizon plan. In this regard, an awareness of the contents of other units of this tool kit can greatly assist the process of formulating the start-up plan.

SCHEDULE OF SIGNIFICANT TOOLS IN UNIT 1

- Copy of National Legislation & Regulations (Including Guidelines (if any) Published by a Regulator/Copyright Office
- Executive Summary of Initial Market Assessment and Environmental Factors
- Promoter Group – Probable List of Members
- CMO Structure Documents (Including Draft Constitution, Member and Distribution Rules and Basic CMO Organigram)
- Probable Funding Model and Two to Three-year Budget
- Time-based Two to Three-year Work Plan (WIPO publication sample extract)
- Initial List of Significant Members/Rights Holders (domestic & foreign rights holders)
- Basic Communications/Marketing Plan
- Sales/Licensing Plan (Including Major Tariffs and supporting Licensing docs)



LIST OF REFERENCES

Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886

Beijing Treaty on Audio-visual Performances, 2012

Ficsor M *Collective Management of Copyright and Related Rights* (WIPO Geneva 2002)

Fraser S 'The Copyright Battle: Emerging International Rules and Roadblocks on the Global Information Infrastructure' 1997 15 J. Marshall J. Computer & Info. L. 762.

Gervais D (ed) *Collective Management of Copyright and Related Rights* 2 ed (2010)

Goldstein P and Hugenholtz B (3 ed) *International Copyright: Principles, Law and Practice* (Oxford University Press Oxford 2013) 335.

Graber CB, Govoni C, Girsberger M and Nenova M (eds) *Digital Rights Management : The End of Collecting Societies?* (Staempfli Publishers Berne 2005) 43.

Implications of the TRIPS Agreement on Treaties Administered by WIPO WIPO Publication No 464 (E)

Kamina P Film *Copyright in the United Kingdom* (Cambridge University Press Cambridge 2004) at 140 – 141.

Kohn A and Kohn B *Kohn on Music Licensing* (2010 Walters Kluwer Austin) 1063 – 1082.

Mazziotti G 'New Licensing Models for Online Music Services in the European Union: From Collective to Customized Management' 2011 Columbia Journal of Law & the Arts (34:4) 778.

Passman DS *All You Need to Know about the Music Business* (6 ed) (Penguin Books 2008 London) at 250 and 259.

Rosen J (ed) *Intellectual Property at the Crossroads of Trade* (Edward Elgar Publishing Cheltenham 2012) 145.

UK Copyright, Designs and Patents Act, 1988

WIPO Copyright Treaty of 1996 (WCT)

WTO Secretariat A Handbook on the *WTO Dispute Settlement System* (Cambridge University Press Cambridge 2004) 1

Yen C 'Flexibility and Simplicity as Guiding Principles for Improving the WTO Dispute Settlement Mechanism' in Georgiev D and Van der Borgh K (eds) *Reform and Development of the WTO Dispute Settlement System* (Cameron May London 2006) 423

UNIT 2

STRATEGY DEVELOPMENT FOR EXISTING CMOs

INTRODUCTION

1. In Unit 1, we looked at the considerations that need to be made when setting up a new CMO. We dealt with some issues relating to the initial market assessment that needs to be undertaken to ensure that the new CMO is based on a sound foundation. We furthermore considered what is required to develop a start-up plan for the new CMO as well as deal with matters relating to building cooperation with domestic, regional and international partners, including affiliating with international federations and forging relationships with like-minded CMOs and support agencies. At this stage, the CMO is 'up and running' and well on its course to achieving its goal of ensuring that its members are remunerated for the exploitation of their musical and/or audio-visual works. By now, the CMO should have received mandates to represent the rights of many of the major rights holders. It may even have entered into bilateral agreements with particular affiliated societies including acquiring the rights of international rights holders through representation agreements with foreign societies or, in the case of mechanical rights, through the local or international representatives of music publishers. The new CMO would have started issuing licenses, probably also reaching agreement with major and other users. Having done this, the CMO's management cannot then sit back and hope that everything will continue to run smoothly. As hinted to in Unit 1, it would be important to constantly assess and review the CMO's progress and to convert the start-up plan into a full-horizon strategy plan. This unit seeks to deal with what is required to develop and/or review a strategy plan in respect of existing CMOs.

THE PLACE OF STRATEGY IN CMO DEVELOPMENT

2. Good corporate governance demands the constant development and review of the corporate strategy to ensure that an organization remains true to corporate objectives and best practices. Thus while it is the normal duty of management to initiate and implement plans, the duty of the board is to ratify the plans and to constantly monitor them. This is linked to the age-old 'principal-agent' (or simply 'agency') problem, which is a scenario which arises whenever the advancement of the interests of one party (the 'principal', in this case members of the CMO or other rights holders represented by it as an agent), depends upon the actions of another party (the 'agent', namely the CMO as represented by the board and management). In an agent-principal relationship, the agent is required to shun



his own interests and to work in the best interests of the principal. However, in such a relationship the agent may be tempted to 'act opportunistically' and to pursue his own interests to the detriment of those of the principal.¹²⁸ Thus the agent-principal relationship sometimes gives rise to a clash between the interests of the agent versus those of the principal.

3. Because the principal does not have direct access to information that could enable him to advance his own interests, it is then incumbent upon the board of directors of an organization to ensure that the interests of the principal are not overridden by those of management. In this regard, corporate governance facilitates the principal's control over the agent's behavior, and thus becomes a 'principal empowering' strategy.¹²⁹ Good corporate governance thus becomes an important tool in ensuring the safeguarding of the interests of a CMO's members. In recent times, fueled by various corporate scandals and failures which have left share/stake-holders stranded, shareholders have begun to more actively assert their rights and to demand more accountability on the part of management and the board of directors. Instances of *member or rights holder activism* can also be detected in the field of collective management, where more rights holders are demanding to know how their societies operate and how license fees are accounted for. Corporate governance is also of interest because as often observed, it '*makes good economic sense*'.¹³⁰ In this regard, the negative economic consequences and the loss of confidence that inevitably arise from a failure of good governance make corporate governance more than just a moral or ethical decision.¹³¹
4. In an environment characterized by *economic liberalization and globalization*, where competition for the best services is on an increase, it would be important for a CMO to justify to its members why they should prefer it to other CMOs offering similar services. While CMOs have traditionally operated on a territorial and often monopolistic basis (with one CMO in a given territory), it is now becoming increasingly possible for a CMO to extend its operations beyond its territorial reach and to offer services to persons or entities in other countries.¹³² A reputation of adhering to the highest possible corporate governance practices will therefore increasingly become

¹²⁸ See in this regard Armour J, Hansmann H and Kraakman R 'Agency Problems, Legal Strategies and Enforcement' Discussion Paper No. 644 (2009) Harvard John M. Olin Discussion Paper Series at 2, available at http://www.law.harvard.edu/programs/olin_center/papers/pdf/Kraakman_644.pdf (accessed on 08 November 2014).

¹²⁹ *Ibid* at 4.

¹³⁰ See Spedding LS *Due Diligence and Corporate Governance* (LexisNexis Croydon 2004) 364. Emphasis added.

¹³¹ *Ibid*.

¹³² In the European Union this has been an issue, particularly since the so-called 'CISAC decision'.

a determining factor when choosing between one society or the other, or as a way of expressing confidence in the board or management of a CMO. The importance of good corporate governance for CMOs was highlighted by the recent introduction of the so-called *TAG of Excellence* project. The project seeks to enhance understanding and respect for collective management of copyright and related rights by assisting a CMO to communicate to the outside world and its mandating rights holders that it maintains a high level of transparency (T), accountability (A) and governance (G).¹³³ In this regard, it needs to be noted that corporate governance (or best corporate behavior) places a focus on the relevance, continuity and fiduciary aspects of the company and entails the following activities: (i) the monitoring and overseeing of **strategic direction**, and in this regard is concerned with the exercise of power over the *direction* of the enterprise; (ii) the **supervision of executive actions**; (iii) **accountability** (by putting in place mechanisms to respond adequately to demands for responsibility; and (iv) the **regulation of the affairs** of the corporation.¹³⁴ It is underpinned by the universal principles of transparency, accountability, fairness and responsibility.¹³⁵ This makes **strategic planning** crucial for any organization. The success or failure of an organization often depends upon the particular strategy it has chosen. The two main components of strategic planning which have an impact on good corporate governance are **strategy formulation** and **strategy execution**.¹³⁶ Strategy formulation includes conducting a *strategic analysis*, while strategy execution includes both the *implementation* and *monitoring* of the strategy. In the case of a CMO, *strategic analysis* involves properly answering the following questions: (i) what ‘rights business’ is the CMO concerned with?¹³⁷ (ii) what specific rights should the CMO administer?¹³⁸ (iii) what other services should the CMO render? (iv) who are the CMO’s customers, and (v) how will success be measured? **Strategy formulation** requires the setting of goals and objectives; assessing current resources; the appointment of competent staff; obtaining the necessary resources; and responding to the regulatory environment. In this regard everything must

¹³³ *Ibid.*

¹³⁴ See in this regard Fernando AC *Corporate Governance – Principles, Policies and Practices* (Dorlin Kindersley Dehli 2006) 251.

¹³⁵ *Ibid* at 251 – 252.

¹³⁶ See in this regard Wixley T and Everingham G *Corporate Governance – A Practical Guide For Effective Implementation* (Siberlnk Claremont 2005) 14 – 15.

¹³⁷ In other words, is it only concerned with rights in musical works (and does this only involve mechanical rights or performing rights or both); or is it a multi-purpose society also administering audio-visual rights, private copy etc. In this regard it needs however, to be noted that ‘... it seems desirable to avoid parallelism and to establish only one organization for each category of rights for each category of rights owners.’ Ficsor M *Collective Management of Copyright and Related Rights* (WIPO Geneva 2002) 135 at para. 362.

¹³⁸ Does it administer the whole bundle of rights in musical works and/or audio-visual works or is it only concerned with some of them?



align with and respond to the vision of the organization. On the other hand, **strategy execution** involves the setting of priorities; preparing detailed plans (including forecasts and budgets); communicating necessary information to members and other stakeholders; taking action to implement the plans; measurement and monitoring of plans against objectives and goals and responding to any requirements for corrective action.

CLARIFICATION OF VISION, MISSION AND CMO VALUES EXERCISE

5. When the CMO started, the promoters would have formulated the vision and mission statements of the CMO and the values that underpin its operations. It is, however, important to constantly revisit and review these statements in order to determine if they remain relevant to the operations of the CMO. This would involve either adjusting and/or confirming the vision, mission and values.
6. Burt Nanus defines a vision as a realistic, credible and attractive future for the organization – an ‘articulation of a destination towards which [the] organization should aim’.¹³⁹ On the other hand, an organizational mission (or purpose) has been defined as ‘a clear and compelling goal that serves to unify an organization’s effort.’¹⁴⁰ A vision is concerned with the future, stating in idealistic terms what the organization wants to do, while a mission is concerned with the present and must be expressed in concrete terms. The vision and mission are often expressed in statements that are seen to best describe the organization’s goals and objectives and how it intends to carry these out. These statements need to be expressed in a simple, concise and direct manner, expressing the CMO’s vision and mission in an attractive manner. The following could be a simple example of a CMO’s mission statement:

‘XYZ Musical Society is dedicated to licensing the works of its members and rights holders and remunerating them in an efficient, fair and equitable manner.’
7. An organization’s vision and mission are informed by the values that it subscribes (or rather adheres) to. In this regard, it would be important to undertake a values-determination exercise. This exercise must, amongst others, determine the *values* that drive the CMO’s operations, informed by its *purpose/mission*. The exercise needs to consider the ethics, principles and motivation that direct the work of the CMO as expressed in the *behavior*

¹³⁹ Nanus B *Visionary Leadership* (Jossey-Bass Publishers San Francisco 1992) 8.

¹⁴⁰ Collins JC and Porras JI ‘Organizational Vision and Visionary Organizations’ 1991 *California Management Review* (34:1) 42.

of the organization’s staff when undertaking certain *actions* or when involved in certain *incidents*. It must also assess the *attitudes* that are detectable from patterns of behavior. Of course, if the behavior displayed by the staff of the CMO when interacting with stakeholders does not meet required standards, positive values can be adopted and inculcated amongst staff members in order to change such behavior. In a nutshell, we therefore see that a *belief* system (as expressed in the CMO’s purpose/mission) must define our *values* (ethics, rules for success), which in turn give rise to *attitudes*, which determine *patterns of behavior* (i.e. actions).¹⁴¹ Thus behavior is the external expression of the internal belief system.

STAKEHOLDER REVIEW

8.
- CMO stakeholders are often identified as persons and/or groups who can affect or be affected by the operations of the society. It is important to conduct a review of all identified stakeholders of a CMO, especially those who depend upon the success of the CMO and upon whom its success is similarly dependent. This would ensure that a clear strategy is devised on how to deal with each. It is of course true that the CMO will not deal with all the stakeholders in the same manner. In this regard, preparing a **list of all identified stakeholders** would be a useful exercise. Prioritization will further be facilitated by distinguishing between the different stakeholder groups. This could be accomplished by dividing the groups into *primary* (those who have influence over the CMO’s vision and mission, e.g. the members of or rights holders represented by the CMO), *secondary* (other important stakeholders having an impact on the CMO’s operations, e.g. users, government etc.) and possibly *other* stakeholders. The two groups would then need to be further separated into those which are *Internal* to the CMO and those which are *External*.
9.
- Once the CMO’s stakeholders have been identified, prioritized and categorized, each **stakeholder group’s expectations** from the CMO need to be identified and listed clearly to ensure proper review or assessment of the progress made by the previous strategy formulation in addressing such expectations in an appropriate manner. See a possible simple illustrative table below.

¹⁴¹ See Manley M *The Leadership – Building Leadership Structure and Styles for the Great Journey* (Crucial Publishing Hilton 2012) 46 – 48.



STAKEHOLDER REVIEW

GROUP	STAKEHOLDERS' REQUIREMENTS AND EXPECTATIONS FROM CMO
<i>Primary:</i>	
Members/rights holders	Proper Governance, Transparency and Accountability; Convenience for works/catalogue registrations; Timely and accurate distributions
Affiliated CMOs	Representation of works; Timely and accurate distributions
Rights Holder Assocs.	Regular and pertinent communication
<i>Secondary:</i>	
Music Users	Justification for licensing; Fair Tariffs; Efficient and equitable licensing arrangements
Government	Compliance with Laws/ Regulations; Justification for awarding of license to operate

10. It would furthermore be important to also consider the question as to who the **primary customers** of the CMO are, bearing in mind what constitutes the CMO' 'services mix' – i.e. the delivery system or chain needed to produce output (i.e. deliver services) required from the CMO as well as to receive input from **customers** (i.e. license fees).¹⁴² The CMO's initial experiences at licensing users and distributing royalties after its formation, should hopefully by now have enabled management to recognize who the more important licensing customers of the CMO are (in terms of customer loyalty; the size of the market/user share etc.) It may then be important to appoint 'account executives' to 'service' these customers or rather to maintain good communication with them. It may at this stage also be important to more clearly identify the core services of the CMO and to differentiate them from secondary and other services. It may be that when the society started, its 'service offering' was defined in very broad terms, and it may have become necessary to more clearly refine this offering in order to have more focus.¹⁴³ It may, at this stage, also be important to formulate a 'customer service charter', which indicates the CMO's promise in relation to the quality of service that it undertakes to offer to its members and licensees, issues relating to response times to queries etc. and overall standards of performance to be expected.

FACTORS/FORCES AFFECTING CMO BUSINESS

11. Having conducted the stakeholder review referred to above, it would, at this stage, be useful to consider the various factors or forces affecting the CMO's business, in a general way. At this stage we are not concerned with a full environmental scan. It is a listing of all *internal* and *external* factors and

¹⁴² For a detailed discussion of the concept of 'services mix' see paragraph 49 below.
¹⁴³ For example, the CMO may, in the case of audio-visual rights, decide that 'rental rights' or 'private copying' should not form part of its core activities.

forces affecting the CMO, which will then be carefully categorized when dealing with the full environmental scan. This is to encourage the planning team's thinking in a structured manner before doing the full scan. Some *internal* factors would include human resources (or the lack thereof), CMO infrastructure, current systems and processes, licensing market penetration, existence and/or accuracy of reports or reporting structures etc., while *external* factors would include issues such as sufficiency of legislation/regulations, public perceptions, new technological methods of usage, the problem of piracy, the political environment etc.

ENVIRONMENTAL SCAN/S

- 12. A full/detailed environmental scan is often built on the initial market assessment (conducted in Unit 1) when the CMO was first established, or on earlier scans undertaken in a previous strategic planning exercise conducted by intermediate CMOs. These scans are used to review or to consider the various factors dealt with earlier, taking into account emerging issues that have since come to light after the previous assessments/planning activities and with the passing of time. These factors/issues are frequently categorized into themes and include:

2.1 Historical factors

- 13. At this stage, the focus would be on the factors that have influenced the CMO to date. The CMO may be a relatively new one or an established CMO which has, however, not frequently used strategy development techniques. Nonetheless, the review would undertake similar processes, although there may be a more detailed focus on specific elements in respect of either CMO.
- 14. In the case of a relatively new CMO, some of the questions to ask are: How has the reception of the CMO been since it commenced with operations? Has there been resistance to its existence, or has it been well received? Are there any notable successes or failures? Has it succeeded in its member-recruitment or rights holder representation drive? What has been the reaction of the user community to its efforts to license the specific bundle of rights forming part of its repertoire? How much money has the CMO so far managed to distribute to its members? It may be that new legislation has recently been introduced to provide for a new source of income, e.g. a system of private copy levies. Is the CMO addressing its strategy for this new source of income for members/rights holders so as to ensure that they can receive their equitable share of the proceeds from these levies?



15. In the case of an established CMO but a relatively new user of strategy development techniques, some of the questions to ask are: what has been the track record of the CMO since its last formally adopted business/strategic plan, where there was one? Has the growth of the CMO met primary stakeholder expectations? Has the licensing market penetration achieved expected results? Have distributions of royalties been undertaken on a regular and accurate basis?¹⁴⁴ Is there general member satisfaction, or are there murmurings among the membership? What is the substance of members' concerns and can these be addressed by taking specific action?
16. These and other related questions form part of the strategy review process and will assist the CMO's management and board to 'regroup' their efforts in order to ensure a more effective management of the CMO and its operations in future.

2.2 Legal and Regulatory Factors

17. Having been in operation for some time, it may have become clear that certain aspects of the legislation and/or regulations relating to the operations of the CMO have resulted in difficulties in the administration of the rights. It could be that certain provisions in the relevant legislation or regulations have not been adequately phrased or rather have created loopholes that make it difficult to license certain usages of works. The regulations themselves may make it difficult for the CMO to operate effectively, such as where there is some encroachment on the operations of the CMO from regulators, or where the permissible administration costs make it difficult for the CMO to 'break even'.¹⁴⁵
18. It is not only legislative or regulatory matters related to the administration of the rights that can create problems for the CMO. The CMO is a 'corporate citizen' and thus many other laws that affect organizations generally (e.g. tax laws, both in respect of residents and non-residents; company laws, information privacy laws, competition/antitrust laws etc.) are likely to also affect it. The CMO's legal counsel and/or the company secretary need to

¹⁴⁴ It is of course accepted that the distribution of royalties is not an exact science as sometimes the use of census, sampling and analogy is justified. The question is whether the distributions were, in all cases, carried out in line with the CMO's policies and distribution rules communicated to members/represented rights holders.

¹⁴⁵ Of course the CMO needs to strive to lower administration costs. However, in the beginning years of operation, especially within a horizon of the first 5 years, the CMO may experience some high costs of operation and if the permissible deduction to cover administrative expenses is set very low, the CMO may find it difficult to 'pull through' and may not survive beyond the first five years. In certain countries the Regulator permits a deviation from specified cost to income levels based on representations and undertakings from their CMOs.

be always vigilant to ensure that the CMO is not caught unaware by legal developments or associated regulations affecting corporate citizens. It would be important for the CMO to actively engage in regular reviews of legislative processes to ensure that no laws are passed which would have a negative effect on the operations of the CMO. Often a law that does not directly deal with the rights that the CMO administers can have an impact on the effective administration of these rights. For example, if corporate law prohibits the distribution of financial benefits to members of a non-profit corporation without providing for exceptions resulting from the administration of members' rights, this is likely to affect the functioning of the CMO.

19. In view of this, it goes without saying that the CMO should constantly interact with legislators and relevant government departments in order to help them appreciate the unique nature of the CMO's operations. This will ensure that whenever new laws or policies are contemplated, the legislators/government officials are aware of the impact that this could have on the operations of the CMO and that the CMO is at least invited to comment prior to the finalization of the laws/policies. The CMO also needs to establish good contact with law enforcement agencies (e.g. the business licensing agencies, police and custom officials) in order to facilitate bi-lateral exchanges of information and to make it easy to solicit their assistance whenever it becomes necessary (e.g. dealing with piracy and illegal importations of audio-visual and sound recordings). Much will of course depend on the 'rights enforcement profile' of the particular CMO, i.e. does it see itself as being responsible to *police* the protection of the rights (e.g. through the implementation of anti-piracy measures), or does it see itself merely as an administrator of rights with no direct concern with piracy issues, leaving the implementation of such measures to other industry bodies? In some countries, the legislation specifically provides for the manner in which the CMO can be involved in anti-piracy measures in conjunction with law enforcement agencies. Whatever the position, it would be important to consider all these matters and to ensure that they form part of the strategy review process, in order to develop a better strategy of dealing with them.
20. The review of legal and regulatory issues should also extend to the review of the CMO's 'litigation profile', which includes the CMO's propensity to tackle cases of copyright infringement (or contractual infringement where licensees default on the license agreement), and its level of success in dealing with such cases. If the CMO's level of success in dealing with court cases is poor (i.e. if it tends to lose court cases) it would be important to 'go to the drawing board' (with the help of legal experts) to understand why this is the case. Perhaps the CMO needs to change its legal counsel and to replace



them with counsel that has greater understanding of copyright litigation and in particular the CMO's business. Perhaps the CMO is getting involved in too many infringement cases and not being able to prepare adequately for them, rather than taking only a few, high-profile cases to set a precedent and to send a message out there that the CMO will not hesitate to go after infringers.

21. Lastly, the review *may* also involve considering the CMO's own internal governance documents (i.e. its constitution – memorandum and articles of association, membership rules and distribution rules). However, it needs to be mentioned that the review of these documents should happen less frequently than the review of the CMO's normal processes and activities. Furthermore, the review of these documents will also not necessarily come up as part of a strategy review session and will take place as and when necessary when it becomes clear that the CMO cannot function effectively apart from such review. Since these documents normally comprise the constitution of the CMO, their review will usually follow a more formal process which involves compliance with statutory requirements (including the need to obtain the approval of members before any changes can be effected).

2.3 Economic factors

22. The factors to be considered in this regard include a consideration of the general health of the country's economy; issues relating to GDP and the inflation; the country's and CMO's growth history and trajectory (in the case of the CMO this would involve a summarized review of the CMO's financial performance over a certain period, e.g. five years as reflected in its annual reports together with 'year-to-date' performance, as compared to the state of the country's general business) etc. It would also be important to consider and compare the performance of various income streams based on the segmentation of the market in order to determine trends and identify possible future opportunities. This comparison of income growth could be divided into Broadcasting and Communication to the Public (including Public Performance). The Broadcasting income stream could be further segmented into Radio and Television; Public and Private/Commercial services; Free-to-air or Pay/Encrypted; Terrestrial versus Satellite or Cable services etc. Comparisons of Communication to the Public or Public Performance could be evaluated based on particular types of users/premises such as hotels and accommodation establishments; restaurants, bars and eateries; retail business and the transport industry etc. and further assessed in terms of

cities, towns or other geographic regions.¹⁴⁶ Private copy income could be assessed from sources such as blank media (audio/video, CDR/DVD); devices (video, audio, memory cards/USBs; external hard drives; mobile phones; Walkman etc.); PCs and other consumer electronic items.

23. An exercise to consider the CMO’s expenditure and cost center profiles would also be very helpful in order to determine where costs are concentrated and possibly where wastage occurs. Generally CMO expenditures can be divided into a number of broad categories which can be compared from one accounting period to the next and correlated with income generated during the same and/or subsequent periods. The extent of centralization/decentralization of licensing and membership activities and associated expenses relating to the staffing and office accommodation of these may also be compared to the income derived from and services delivered in those centralized/decentralized offices.¹⁴⁷ Some CMOs choose to have ‘in-house’ professional services (e.g. legal counsel, accounting/book-keeping, ICT, music usage monitoring etc.) whereas others choose to outsource some of these activities. The careful costing, comparison and consideration of whether certain services should be ‘in-house’ or outsourced is a matter for each CMO to determine. However, knowledge and awareness of the actual cost implications can have significant implications on the choice taken and thus, the performance of a CMO.
24. The economic review would be incomplete without an exercise to consider the history and patterns of distribution of royalties among rights holders, both domestic and foreign. CMOs are sometimes accused of distributing more royalties to foreign rights holders than local rights holders (a phenomenon especially prevalent in music importing countries), or vice versa. Of course, royalties have to be distributed based on actual usage of works. Nevertheless, it is important to keep regular and accurate statistics of distributions made to rights holders. Exercises such as the above will ensure that empirical data is available for strategy development as well as dispel false perceptions by providing actual distribution statistics. Other uses of distribution statistics have been to indicate market shares, sources (in respect of both rights and uses) and categories of rights holders.
25. It happens many times in the operations of a CMO that certain license fees received cannot be paid out as royalties because of the existence of undocumented/unidentified works or unidentified rights holders. This results

¹⁴⁶ See Unit 3 (Licensing Practices) for more details on market segmentation.

¹⁴⁷ Some CMOs operate from one main or *centralized* office; other CMOs have a number of regional or *decentralized* offices from where their services to a geographic region or area are rendered.



in 'reserved income', namely, income that is not immediately distributable. It is important for a CMO to put in place systems to ensure that the issue of undocumented works and unidentified rights holders is dealt with timeously, to prevent the accumulation of undistributed license fees. One way of doing this would be to publish undocumented works and information about unidentified rights holders immediately after any distribution and to invite rights holders to study the lists and, if applicable, lay claim to works that belong to them. To ensure the equitable treatment of all rights holders, a system must be put in place that assures rights holders that works (and the related royalties) are allocated to the correct rights holders in an objective and systematized manner. In view of the need to have ongoing research and matching of works and performances, the CMO needs to invest in a team of competent researchers within the documentation/music usage department, who are capable of carrying out this research.

26. Other than reserved income arising from undocumented works/unidentified rights holders, another important source of reserved or unallocated income would be the interest earned from the investment of license fees (in approved institutions), pending distribution. This investment is made possible by the fact that there is always a lapse of time from the reception of license fees to the actual distribution of royalties to members. The basis of this distribution (based on music usage returns as corroborated by research for the year in question) needs to be processed first.¹⁴⁸ The board must of course be empowered to address this unallocated income (either through a resolution of members at a general meeting or through a general authority in the CMO's constitution) and to place the monies on investment for a period of time pending the treatment or distribution of the monies – possibly set off against the period's expenditure, resulting in a greater distribution to rights holders. Alternatively the invested monies may be paid out separately as a non-royalty distribution to rights holders in proportion to their participation in the previous distribution/s.
27. The CMO may itself (through the board) set aside a certain portion of income during a particular year into a reserve fund in order to cater for future expenditure or further infrastructural developments. This reserve fund may be used for a number of purposes (i.e. there may be different components of the fund). For example, a *technological reserve* can be created to ensure that the CMO always has money available for the development of better information technology systems to ensure greater efficiency and to keep

¹⁴⁸ The situation may be slightly different in the case of mechanical rights CMOs (especially where usages are licensed on a transactional or work-by-work basis). In such a case distributions are often processed in shorter intervals.

up with technological changes. An *anti-piracy reserve* is also conceivable, where money is set aside for use in efforts to combat piracy. Some CMOs also allocate a certain portion from the reserve fund for *cultural* purposes (i.e. the promotion of the arts) or as *social assistance* to members (e.g. setting up a fund of some sort for members).¹⁴⁹ Transfers from the reserve fund could also be used to augment the royalty income of members in a year where performance has been affected by problematic market conditions. The allocation of any license fees into a reserve fund needs to be approached with caution, so that where this is provided for, it must not affect the payment of royalties to members. The *level* of the reserve allocation (i.e. what proportion of the license fees or investment income is to be used) and the patterns thereof need to be the subject of a clear CMO Policy which must specifically indicate the circumstances when the allocation is done etc. This policy needs to be constantly reviewed to cater for changing needs.

28. Another important consideration relating to economic factors is the general state of the music and audio-visual industries in the country. This can have an impact on the financial performance of the CMO. Thus where there are high levels of piracy and low levels of respect for copyright, the CMO's revenue can be drastically affected. It would thus be important to consider this, in order to devise a proper plan of action to deal with the situation. For CMOs that form part of the state administration much will depend on the state of finances of the copyright office or rather the ministry under which the CMO falls. It goes without saying therefore that in periods of economic recession and general poor economic growth will very likely have an impact on the operations of such CMOs.

2.4 Technological factors

29. A review of the impact of technological factors would include (i) the state of internal CMO operations; (ii) a consideration of the external rights holder environment; (iii) a consideration of the user/licensee environment and (iv) the growing 'new media' environment and its challenges (e.g. digital explosion of uses, piracy etc.)
30. Regarding **internal CMO operations**, a number of focus areas need to be considered. The *level of documentation of the CMO's internal systems and processes* needs to be reviewed. To a large extent, CMO operations need to be capable of functioning on a 'turnkey' basis. Because CMOs are specialized entities processing large volumes of data requiring certain unique skills and

¹⁴⁹ This may be used to create a *cultural fund* for the support of the arts (e.g. through scholarships, seed funding for arts enterprises, etc.) or a social security fund for author members (e.g. a pension or retirement annuity fund).



expertise, it is important that all essential CMO processes and systems are fully documented and that they have a high degree of automation.¹⁵⁰ This makes it easy to train staff on the use of the systems; it ensures the security of operations and it guards against the loss of organizational memory – a situation that tends to have serious consequences for a CMO where systems and processes are not well documented. A CMO must be able to issue licenses, process royalties, capture the details of members or applicants, capture information about works, in *real time*, using uniform systems. In some circumstances, to ameliorate increased cost of investments in new systems, a CMO may interact with other existing CMOs to ascertain what systems might be purchased, licensed etc.

31. Related to this, the *level of the CMO's information and communications technology (ICT)* needs to be continually borne in mind. In this regard, on-going review of the levels and degree of computerization and related functions (e.g., Internet connectivity, LAN and web activity etc.) as well as office automation including printing and photocopying facilities needs to be undertaken so that the computerized/automated systems and processes can achieve a high level of 'up time'. If one considers that a single radio channel transmitting music fifty percent of its on-air time will play over eighty thousand 'tracks' in a single year and that one work may have a number of participating rights holders in the royalty division (especially in the case of audio-visual works), it is clear that with less than a dozen licensed radio channels a CMO will have to process millions of transactions to be able to effect the distribution of the collected income. Where not only domestic but also foreign works are used, the documentation databases of the CMO need to be able to respond to these 'non-domestic' additions, new versions of these, changes in its documentation data base reflecting the foreign rights holders who in turn may be members of one of scores of CMOs from various countries across the world.
32. What has been said above also applies in respect of television transmissions, with the further refinement being that where only parts of the works are used in transmissions, these also need to be reflected. All of the above has an impact on the performance of the CMO. High performance CMOs have high levels of computerization and connectivity between the CMO, its members and affiliated CMOs around the world. The *appropriate use and choice of software solutions and applications*, both in terms of commercial software (e.g. whether to use a particular operating system; the choice of linked communications products [social media platforms,

¹⁵⁰ Refer to Unit 1 under Operations Management for more information on the essential systems and processes of a CMO.

email and similar products] etc.) and specialized software (e.g. membership, documentation and distribution systems; document management system; archiving software; etc.) are strategic considerations due to the high level of investment required. Where use is made of works of foreign origin, it is also important to ensure that the CMO's systems have *conformity with international standards and tools*. One of the positive aspects of the system of collective management is the use of certain common standards and systems among CMOs administering a particular category of rights (such as the ISWC, IPI and CIS for musical works and the ISAN, IPI and IDA for audio-visual works). These standards ensure uniformity in essential areas and facilitate the efficient administration of rights across countries around the world.

33. A technological assessment of the **external rights holder environment** involves a consideration of the CMO member/rights holders' level of exposure to technological advancements and use of various types of technology. In an environment that is becoming increasingly 'paperless', a lot of time and money can be saved through the use of technology.¹⁵¹ Often the extent to which a CMO can 'innovate' in the area of technology would be dependent on the levels of access to technology of its members (and users). Low levels of access to technology on the part of rights holders may stymie the CMO's efforts in this regard. The members'/rights holders' 'market interface' (e.g. their ability to access bank accounts and Internet banking services, their access to Internet connected devices such as smart phones and personal computers etc.) will also determine the measures that the CMO can take in implementing *member interface* projects. Thus if there is limited access to Internet or other electronic banking infrastructure or low access to computers, the CMO may be hampered from creating an Internet payment interface for royalties or creating member portals for the electronic submission of works and rights holder information and documents, etc. On the other hand, the existence of data protection and electronic communication laws will also determine if the CMO can successfully implement some of these rights holder interface systems.¹⁵²
34. It would also be important to consider the impact of technology on **the user/licensee environment**. In this regard, it needs to be noted that the digital revolution has ushered in new business models that involve the convergence of rights and undermine the 'clean' *fragmentation* of rights

¹⁵¹ For example, rights holders could 'notify' or register their new works and lodge documents electronically using secure web portals supplied by the CMO, rather than submitting these physically.

¹⁵² If the local laws do not recognize electronic evidence the CMO may be compelled to rely on the use of physical documentation.



that has characterized the traditional market of music rights licensing.¹⁵³

Thus instead of just providing access to one type of work (e.g. musical works), digital service providers (DSPs) provide access to a digital library of *multimedia* products incorporating musical works, sound recordings, films, games, images, literature and the like. The DSP considers it cumbersome (and at times costly) to procure licenses from several copyright owners of the different content forming part of his multimedia offering, and would prefer to deal with just one party (i.e. he would prefer to have a *single fee license* for all usages). DSPs often consider the prospect of negotiating with each rights holder having rights in the multimedia product unnerving, frustrating and sometimes a hindrance to their business undertaking. This is a global-scale problem for which there is no uniform solution. The present reality is that the user is required to obtain a license in respect of all usage of the rights converged in the multimedia offering. Because the user will often have difficulty in this regard, the CMO must ready itself for delays in issuing licenses and receiving licensing income from such usages.

35. The use of online media monitoring services may go some way in providing a solution to the problem but will not eliminate it.¹⁵⁴ A better solution would be if the CMO acquired a mandate to license all usages in the multimedia offering¹⁵⁵ – something which could divert a CMO administering authors' rights from its primary mandate of representing only its members/rights holders. Another problem in this regard relates to the *format* that the DSP must use when reporting on usage, which involves electronic reporting, which may not conform to the CMO's interface (e.g. use of incompatible metadata, tagging, record layouts and ftp sites). The CMO may also assist DSPs by creating an online portal or application that the DSP can use when reporting on usage. The portal can also contain general information, tariffs applicable, application forms and frequently asked questions (FAQs).
36. A technological review must, of necessity, also consider the **growing new media piracy profile**. The digital revolution has made it very easy through peer-to-peer file-sharing technology to infringe upon copyright works. Easy, 'one-touch' access makes it possible to access multiple works without the need of procuring a license. A lot of innovation has taken place in this regard, with new models providing easy access to digital content springing

¹⁵³ By fragmentation we mean the fact that copyright is a 'bundle of rights' often involving the rights of several parties. Gervais D (ed) *Collective Management of Copyright and Related Rights* (Wolters Kluwer The Netherlands 2010) 10 – 13 addresses this fragmentation problem, which, he observes, 'has its roots in the pre-Internet history of copyright ...'

¹⁵⁴ Besides cost considerations in the use of such services, the accuracy of the information supplied may be a matter of some legal debate.

¹⁵⁵ Gervais *Collective Management* 13 suggests this solution in relation to the fragmentation problem.

up every time. Many of these services are, however, not subscription-based and provide easy access to content without actually paying rights holders. This *digital piracy* has proven to be a thorn in the flesh for rights owners, and regulators are still grappling with finding a workable solution to the problem. 'Jurisdictional' issues arising mainly from the territorial nature of copyright make it very difficult to 'police' infringements. Some countries have come up with solutions such as the use of *take-down notices*, which are issued to the DSP or ISP (Internet Service Provider), compelling them to remove any content over which there is a claim of copyright infringement.

2.5 Socio-political factors

- 37. A review of socio-political factors would include factors such as (i) the CMO's relations with rights holders and rights holder associations, (ii) the level of the rights holders' knowledge of the CMO and its activities and (iii) government relations and/or general public affairs.
- 38. In relation to **the CMO's relations with rights holders and rights holder associations**, the review needs to consider things like the level of communication with rights holders/rights holder associations; the actual information being disseminated etc. It is important that the CMO constantly communicates with its members and rights holder bodies regarding crucial matters. Often CMOs are implicated for not communicating adequately with members on important decisions. This may lead to member disillusionment and where there is an opportunity to form an alternate society members may leave the CMO and establish such a society or may join a rival society if one exists. The board and/or management must not think that members are entitled to only receiving the mandatory information disseminated at the annual general meeting. Crucial information should be disseminated as and when it arises, whether through letters, email communication, through regular posts on the CMO's website (as well as on social media platforms) or by calling a special general meeting of members.
- 39. Rights holder associations, such as the national association of publishers, composers, screenwriters/writers' guild, also expect the CMO to communicate and/or confer with them regarding matters of general interest to the rights holder community. For example, if the CMO intends to adopt a certain position with regard to a pending legislative amendment, national policy or other important development, it may in the least, be necessary to keep the rights holder associations abreast with developments in this regard or to obtain their support. Thus the CMO needs to consider whether any strained relations with rights holders and rights holder associations may not be as a result of insufficient or poor communication. A complication



may arise where the CMO is part of the copyright office or the state administration in general. Under such circumstances, it may prove difficult for CMO officials to take the initiative to influence legislative changes, thus leaving rights holders and their associations to their own devices.

40. The issue of **the level of the rights holders' knowledge of the CMO and its activities** is related to the communication and information-dissemination issue. Rights holders will only be aware of the activities of the CMO if these are made known to them. Knowledge of the CMO and its activities can be disseminated through *formal publications* such as the annual report and annual financial statements, as well as newsletters, FAQs, the CMO's magazine (if any), the CMO's website, e-zines etc. The CMO can also use various *educational platforms*, including the use of physical material, website material, workshops, webinars and the like. It would be important for the CMO to also see itself as playing a role not only in imparting knowledge about its activities but also in building the members' knowledge capacity in relation to authors' rights or copyright issues in general (e.g. the economic and moral nature of the rights; the importance of not permitting a 'buy-out' or other adverse forms of disposition of their rights etc.). This would also include imparting knowledge on the role that the CMO plays in safeguarding and administering the rights, as well as the CMO's obligations to its members.
41. In the area of **government relations and/or public affairs**, the assessment should include a consideration of the CMO's interaction with regulators and relations with the oversight ministry (often the Ministry of Economic Affairs/ Trade and Industry and/or Justice, but sometimes the Ministry of Arts and/ or Culture). The CMO should endeavor to remain on good terms with these entities. An assessment of government relations needs to also consider the CMO's lobbying profile – i.e. the extent to which it may influence legislative and regulatory changes/improvements. The CMO may consider the use of formal lobbyists in this regard, or it may form a board advocacy group (which may in fact be the best option for the CMO in view of the profile of the board).¹⁵⁶ Reports that deal with the contribution of the copyright-based industries to the national economy, such as the various studies conducted by WIPO, CISAC and other similar studies can be useful tools in convincing authorities on the positive role played by the copyright industries (of which CMOs are a part) in promoting economic growth. These studies are also

¹⁵⁶ Often CMO boards are comprised of persons who are national icons in the arts industries, such as popular musicians and well known film directors, producers and actors. When such persons make impassioned pleas before legislators for the amendment of legislation, the level of reception for their submissions may be higher than if these submissions were made by unknown administrators.

important for purposes of the strategy session in that they enable the CMO to see the possible impact and role of its activities on the economy.

42. The *public affairs* function extends to relations with rights holder groups and other parties involved or having an interest in intellectual property (IP) matters. These may include other parties involved in the copyright industries (e.g. reprographic rights CMOs/CMOs involved in the rights of literary authors and publishers; neighboring rights CMOs etc.), the software industry etc. Mounting a lobbying strategy that involves all these parties will create a strong united front and can more effectively convince legislators about the need to implement legislative and/or regulatory changes. Further to this, user/consumer groups must not be left out of the CMO's public affairs strategy. This includes a review of the state of communication and relations with trade associations representing the users of musical and audio-visual works, consumer associations as well as public sector/government users, which may to a greater or lesser extent be impacted by some policies or practices of the CMO.

2.6 CMO views of possible future developments

43. The strategy review should also consider other issues relating to possible future developments which may not have been covered in any of the above-mentioned environmental scans. These would include short-term issues relating to matters that are imminent or otherwise may be expected to arise in the near future, as well as medium-term issues relating to internal CMO operations or external/structural issues, which can be anticipated. Actions and/or tactics would need to be devised to deal with these issues. Some of these issues may relate to *legal risks* (arising from an inevitable, negative change of laws), *political risks* (as a result of a possible change of government and or government policy), as well as risks posed by an imminent leadership change.

SWOT ANALYSIS

44. A SWOT analysis is an important aspect of strategy planning. It is used to determine the **S**trengths and **W**eaknesses of the CMO; the **O**pportunities available to it as well as the **T**hreats it is facing or may face.
45. A SWOT analysis is normally divided into a consideration of *internal issues* (which is concerned with the strengths and weaknesses of the CMO) as well as a consideration of *external issues* (which is concerned with opportunities and threats).



2.7 Internal Issues

46. The **strengths** of the CMO need to be carefully identified and a list of the top 5 – 8 strengths should be highlighted. This will enable the CMO to identify areas of competitive advantage to build on and the corresponding actions and/or tactics that need to be adopted or maintained in order to capitalize on these strengths. For example, it may be that the CMO has acquired rights from the main rights holders (major music publishers and authors/composers; major film producers, directors, screenwriters etc.). It may also have managed to license a major broadcaster, or it may be seen in positive light by the regulator. All these would be strengths that the CMO can build on. However, not only must the exercise identify the strengths of the CMO but its **weaknesses** as well. As in the case of strengths, a list of between 5 – 8 key weaknesses relating to areas where the CMO is perceived to be performing in a less than optimal manner needs to be identified. For example, if the CMO is perceived as bullying or aggressive by the user community, this would be a clear weakness on the part of the CMO, which can frustrate its efforts to license the users. The CMO must devise corresponding strategies (i.e. actions and tactics) to *reduce* or, where possible, *eliminate* the identified weaknesses.

2.8 External Issues

47. In dealing with this, the CMO must identify the **opportunities** available to it, i.e. the areas of business that are currently available for it to exploit. The aim is to capitalize on these opportunities in order to further build on the CMO's strengths. Capitalizing on these opportunities may also improve the CMO's position in the market and reduce the ability of competitors to enter the same market. In this regard, it would be important to 'strike the iron while it is still hot'.¹⁵⁷ Here also a list of 5 – 8 top opportunities needs to be prepared and relevant actions/tactics devised to capitalize on these opportunities. A consideration of the **threats** facing the CMO also needs to be made and a list of 5 – 8 key threats identified, in order to devise actions to lower or ease these threats. A common threat among CMOs that is likely to present itself sooner or later is the threat of unfavorable regulations or legislation,

¹⁵⁷ Having indicated this, it is also important to note that not all 'opportunities' may be utilized immediately. Whether an opportunity is utilized will be largely dependent on the availability and prioritization of resources. Because of these considerations some opportunities may not be utilized at all. However, there are certain non-recurrent opportunities that need to be capitalized on at the earliest opportunity.

which is likely to affect the CMO's *legitimacy*.¹⁵⁸ However, the CMO's sense of legitimacy may also be negatively affected by the CMO's own unethical practices, which could prompt the legislator to further remove the CMO's legitimacy through regulatory means.

CMO 'SERVICES MIX'

48. Today, conventional marketing strategies are employed by most organizations worldwide. In some countries, there is a view taken that marketing strategies are not really applicable to CMOs due to the special field of endeavor in which they operate. There is, however, a growing view among many CMOs that marketing strategy is equally relevant to their operations. Particularly in voluntary systems of collective management, CMOs have two key 'customer bases', namely the suppliers of the CMO's rights, i.e. its members/rights holders; and the users of rights, e.g. broadcasters, other 'communicators to the public' etc. In marketing theory, the concept of 'marketing mix' relates to the so-called four Ps of marketing decisions (product/service, price, place and promotion) which, in this case a CMO has to make, to which three additional Ps of service marketing could be added: people, process and physical evidence.
49. Whereas consideration has already been given to factors/forces affecting the CMO's business and a detailed environmental scan and SWOT analysis conducted, the question as to which services, and where, when and how these are to be offered, still needs to be addressed. The following discussion aims to do so.

2.9 Product/Service

50. The Bundle of Rights which a CMO represents and subsequently offers to Users as Licenses depend upon the scope of *services* offered by the particular CMO and which are 'acquired' from the owners of these rights, either through an assignment, exclusive license, agency arrangement or some other form of representation. A relationship thus exists between the

¹⁵⁸ Legitimacy in business is defined as 'a generalized perception or assumption that the actions of an entity are desirable, proper or appropriate', and is fully discussed by Zott C and Huy QN 'How Entrepreneurs use Symbolic Management to Acquire Resources' 2007 Administrative Science Quarterly (52:1) 70 – 105. It has to do with the perceptions that society has about an organization, i.e. whether the organization is seen as having a useful contribution to make to society and thus whether there needs to be a positive reaction to the organization's existence, activities and advances. In the case of a CMO legitimacy would include the perceptions of users (whether they feel that it is necessary to procure a license for music usage or instead feel that they are not doing anything wrong by not procuring such a license); the perception of rights holders (whether they feel that the CMO can adequately represent their rights) and society at large (whether they should be sympathetic to the cause of the CMO or not).



CMO and these 'suppliers of rights', usually evidenced by a member/rights holder affiliation agreement and often based on some form of *membership rules*. The *service* the CMO offers in acting as an intermediary between its members/rights holders and music users is usually evidenced in the form of various *licensing schemes* offered to categories of users and frequently reduced to a license agreement/contract.

2.10 Price

51. There is a science to the pricing of the usage of music by CMOs. The price level of specific licensing schemes (or *tariffs*) as offered by CMOs to users are related to a combination of factors including but not limited to (i) the rights used: (ii) nature and scope of usage (sometimes classified as essential, necessary, background and incidental): (iii) whether the usage covers the whole repertoire (i.e. based on a *blanket license*) or if it has certain limitations: (iv) the value attributed to the rights by the owners of rights (whether national, regional & international): (v) duration of usage: (vi) harmonization principles for particular user groups: (vii) consultations/ negotiations with rights owners and representative user groups, and (viii) the fast evolving music using market. Unit 3 deals more with the issue of tariffs and pricing.

2.11 Place

52. Place refers to the services distribution channels which the CMO may use to deliver services to members/rights holders and users including various platforms and institutions. Choices are made as to whether to deliver services via use of formal CMO representatives, agencies, third parties and other contractors or intermediaries. Other examples of *place* are the use of what may be termed 'comprehensive or group licensing' agreements whereby a whole music using sector (e.g. association of hotels) or region (particular province in a country) are offered a licensing scheme to cover that sector's or region's 'affiliates'.

2.12 Promotion

53. To some, the possible use of member/rights holder funds to advertise, promote or generate publicity for the CMO's activities may be questionable. However, a CMO's promotion strategy is a specific program of communications, materials and methods devised to present the CMO's services to its 'customers' (both members/rights holders and users) so as to contribute to its long-term success. It is therefore inevitable that some form of promotional activities has to be undertaken if the CMO is to be successful.

54. The additional three Ps specific to service marketing (relevant because CMOs are generally service entities) are dealt with below:

2.13 People

55. This refers to all the human actors (e.g. employees and management) who play a part in service delivery and influence customers' perceptions. A CMO is a service organization that depends to a large extent on its staff to carry out its mandate. The *skilling* of staff, both in terms of efficiently executing the various activities and processes that a CMO is involved with and properly interacting with users, members and other stakeholders, is at the core of the CMO's mandate. In this regard, organizational culture and customer-service orientation play an important role here.

2.14 Process

56. This relates to the operating systems and service delivery mechanisms and procedures by which services are delivered to customers. As indicated earlier, processes and systems, and their proper documentation and automation, are central to the operations of a CMO. They represent the 'engine room' which powers the activities of the CMO. In this regard, the IT function of a CMO plays a pivotal role, especially with regard to *transaction processing* and *information and data security* – processes that often involve the use of complex *mainframe* computers amongst many CMOs.

2.15 Physical evidence

57. This refers to tangible means used to deliver or communicate the service involving standards and policies of customer service and materials such as brochures, letters, business cards, report formats, application/notification forms, physical facilities etc.
58. In considering the services mix, the strategy team needs to distinguish between *primary services* and *secondary services* so that the CMO does not focus resources on services that are only of a secondary nature, to the detriment of its core functions. As indicated in Unit 1,¹⁵⁹ the core functions of a CMO are acquisition of rights (i.e. *membership*), *licensing of users* and *distribution* of royalties. All other activities that do not directly relate to these three core functions therefore constitute secondary services of the CMO.

¹⁵⁹ See commentary under of Unit 1 – Operations Management.



Where resources are strained, the CMO may outsource the secondary services, reduce them or eliminate them completely.¹⁶⁰

CMO ORGANIZATIONAL DESIGN AND STRUCTURE

59. The strategy review process needs to also consider the CMO's organizational design and structure in terms of both its *legacy* systems¹⁶¹ and its corporate structure. This is done in view of determining their appropriateness in light of the CMO's continuing quest to remain relevant in a changing rights holder and user market. The review will thus need to consider aspects in the organizational design and structure that remain effective or relevant in light of the CMO's previous strategic plan and goals. In determining the relevance of the legacy systems and the existing corporate structure, consideration will also need to be made of the current profile and/or needs of the CMO's customers (both members/rights holders and users) and the ability to effectively and efficiently carry out the CMO's core functions. The review will need to carefully consider all of the key processes and systems of the CMO (whether manual, automated or computerized), and interconnected activities associated with such processes.
60. The CMO's current corporate structure will also need to be reviewed to determine if it is capable of enabling the CMO to continue to carry out its mandate. In this regard, it needs to be considered what style of corporate structure would best suit the needs of the CMO (i.e. whether a *centralized*, *decentralized* or *functional* corporate structure would be appropriate).¹⁶² It would then be crucial to respond to any need for adjustments. Apart from a consideration of the CMO's legacy systems and corporate structure, it

¹⁶⁰ It is however suggested that CMO boards and management should not adopt a hard-line approach towards the offering of services that fall within the category of corporate social responsibility (CSI), such as providing support for cultural activities and social assistance to rights holders, as these services can provide the CMO with a social responsibility *premium* in the sense of increased customer loyalty, as the CMO would be seen as adding value to society.

¹⁶¹ I.e. the CMO's rights holder, user, documentation, distribution and office systems and applications that it has always used, but which may (upon review) prove irrelevant to and/or incompatible with current developments and thus may be costly to maintain.

¹⁶² This has to do with the level of independence given to business units or sections with regard to decision making. Does the decision-making power reside in the center, with senior management (*centralized*) or is it devolved or delegated further down the management hierarchy to the business and/or regional units (*decentralized*). On the other hand a *functional* organizational structure focusses on organising people based on the functions that they perform, placing those with similar knowledge in one unit. It places an emphasis on coordination, supervision and task allocation within a particular functional area.

would also be important to consider the *organization culture*.¹⁶³ The current organization culture needs to be assessed and considered against the organization's vision, mission and values/beliefs, to see if it properly aligns to those. The influence of past leadership, whether positive or negative, also needs to be considered. This is to be done with a view to developing a shared awareness of the current corporate culture in order to determine the positive aspects of the culture and what may need to change in order to move the organization forward. A redefinition and/or confirmation of the organization's culture may then result. In this regard, it needs however to be mentioned that changing an organization's culture involves the change of attitudes, behaviors and habits and is not something that can merely be expressed in a statement.

61. The management of culture change is a full process in itself and may be driven by a number of reasons including (i) building better customer relations; (ii) a new strategic approach; (iii) new service delivery methods; (iv) outsourcing or acquisition of services; (v) right-sizing or down-sizing, and (vi) new strategic alliances or joint ventures. Once the drivers of the need for the change of corporate culture have been identified, resistance to such change may either be work-related or non-work-related. A process should be activated to ensure buy-in of the new culture. Some of the elements supporting a change in culture by staff would include ensuring participation by affected parties in the change process; clear communication on all issues which affect staff or changes to the working environment; further training where appropriate; and recognition of and/or reward for contribution and working on attitudinal dispositions.

HUMAN RESOURCES, INTELLECTUAL CAPITAL AND OTHER RESOURCES

62. A CMO is largely a knowledge and systems-driven business and is significantly reliant on human and information systems and related resources for its effectiveness. It would thus be important to do an overview of the current inventory and investment in staff in relation to the various functional areas in the organization (i.e. front office, back office and management, including the board). This can be done based on the following focal areas:

¹⁶³ Organization culture refers to 'the values and behaviors that contribute to the unique social and psychological environment of an organization', and includes the organization's expectations, experiences, philosophy and values, as expressed in its 'self-image, inner workings, interactions with the outside world and future expectations.' See www.businessdictionary.com/definition/organizational-culture.html (accessed on 15 December 2014).



2.16 The Human Resources (HR) Function

63. Closer scrutiny of the operations of the HR function, in particular its role in staff recruitment, selection and retention, needs to be undertaken. This is the key role of the HR function and it plays an integral part in the deployment of human capital to the organization. The question therefore needs to be asked whether HR is correctly carrying out this role: What is the impact of HR's policies on human capital deployment? If a wrong person is deployed in a legitimate (or right) place or function in the organization this can lead to *regression*; on the other hand, if a right person is deployed in a wrong place, this can lead to *frustration*. If, however, a right person is deployed in the right place, this leads to *progression*. Overall, the placing of the right people in the right places in the organization results in *multiplication*¹⁶⁴.

2.17 The Role of Leadership

64. The role of leadership in the advancement of human and intellectual capital in the CMO needs to be also considered. True leaders value their team members and in fact, add value to them, making them more valuable. Good CMO leaders use their influence at the right times for the right reasons. They ensure that they can lead themselves successfully before attempting to lead others and appreciate that their dispositions are more important than their positions. They take a little greater share of the blame and a little smaller share of the credit. Nevertheless, true leaders do not leave their team loose and without structure, but instil within them a sense of responsibility by creating structures of authority and accountability, while allowing the team enough freedom to be creative and innovative¹⁶⁵.

2.18 The Level of the CMO's Investment in Learning and Development

65. In the beginning of this section, we emphasized the fact that a CMO is largely a knowledge and systems-based business. In view of this, it would be important to invest resources in providing training and learning opportunities for CMO staff in critical areas of their roles, particularly in relation to the core functions of the CMO. A CMO needs to have a sleek team of well-trained and coordinated licensing representatives that are able to confidently approach users and to adequately and convincingly explain the basis for requiring music licenses. In the same manner, an effective and efficient *debtors'* control team and function must augment the work of licensing representatives by ensuring that licensees timeously deliver on their

¹⁶⁴ See Maxwell JC, *What every Leader needs to Know 101 Series* (Maxwell Motivation Inc. Georgia 2003), generally

¹⁶⁵ *Ibid.*

undertaking to pay license fees. This is important to ensure that members/ rights holders are in fact paid in respect of the exploitation of their works. In the end however, license collections must in fact be distributed and this must be done accurately and on time. Staff involved in this function must therefore be well-trained in the matching of works with earnings and rights holders and to effectively carry out the research required to do so. In addition to this, a well-trained and equipped CMO leadership is necessary to steer the CMO ship to its desired destination. In all these instances relevant, on-going training and development is important.

2.19 Systems and Processes

66. A systems and processes review needs to be conducted to ensure that there is an appropriate level of integration between human and computerized resources. It does not help to have an expensive IT system that is, in fact, not being used effectively and optimally. The review must also consider the CMO's ICT resources (i.e. its hardware and peripherals and both pre-packaged and special applications software) to determine if they are able to adequately satisfy the growing needs of the CMO. Issues relating to Internet connectivity and the choice of telecommunication services need to be considered also. Important considerations in selecting an appropriate Internet Service Provider (ISP) for the CMO include considerations of the availability of the particular ISP's connectivity and 'uptime'; the level of bandwidth required and available, and connection with *decentralized* operations (i.e. individual workstations and office locations). In today's economy with its energy problems access to clean power is also an important consideration to take into account.

2.20 Other Resources

67. Important considerations in this regard include the financial and other related assets of the CMO and the fiduciary management of such assets. Is there a proper surplus cash management system that will ensure that members obtain the most optimal benefit from such funds? Does the CMO invest monies received pending distribution in safe, interest-bearing instruments administered by reputable, approved institutions?¹⁶⁶ Further to this, the CMO needs to monitor and minimize costs through the implementation

¹⁶⁶ Often there is a lapse between the time when license fees are collected and the time when they are actually distributed – sometimes between six months to a year. It would be prudent for management under such circumstances to invest such moneys in reliable investment instruments. The invested portion can then be paid out as additional, 'non-royalty' income to members or it can be used to defray administration costs, thus releasing most of the collected license fees for distribution to members.



of sound financial management practices. This includes the proper use of budgeting processes linked to the achievement of goals (see below under 81 for a discussion of budgeting¹⁶⁷). Traditional *capital expenditure (capex)* budgets may be used and a template circulated to all cost centers to ensure *capex* uniformity. The budget needs to be reviewed on a regular basis and amortization sufficient to cover developmental needs must be provided for. *Expansion (or special capex) budgets*, to cater for the expansion of existing programs, new programs, special adjustments in reward schemes etc. may also be used. These can be particularly useful in the allocation of portions of the collections to reserve funds, as dealt with earlier above. Appropriate reserves policies would then need to be created in this regard.

CMO CRITICAL SUCCESS FACTORS

68. A CMO is expected to grow its income and license users in order to retain its credibility in a market oriented business environment. Likewise, it must manage its expenditures and add value to its members/rights holder constituency, whilst also distributing income to members timeously and accurately.
69. Critical success factors (CSFs) are those factors or/and activities that are necessary or critical for an organization and must be properly executed to achieve success or rather to carry out the organization's mission. These are factors or areas where things have to go right in order for the organization to perform in a competitive and successful manner and without which the organization's performance will be below the desired results. It would be important to identify and/or assess the CSFs in respect of both the CMO's current business model and any planned future and diversified business.
70. Each CMO's CSFs need to be clearly identified in order to place correct and balanced focus on them. In the administration of authors' rights it would be important to consider factors that affect **income**; factors that affect **expenditure** and those that affect **distributions**. Some of the *common factors* that influence a CMO's **income generation** include: *scope of rights* represented; *broadcast income* (which is influenced by the number, controlled content of works, classification and location of radio and television channels); *public performance income* (influenced by the number, type of premises, location and extent of rights usage by/of establishments involved); *communication to the public income* (influenced by offering models, number of telecommunications operators, content aggregators/ISPs/DSPs involved); *private copy income* (influenced by the type of carriers/devices covered by

¹⁶⁷ See also Unit 4 for more detail on Finance & Administration matters.

the Levy regime); *international income* (influenced by foreign usages of CMO repertoire of musical works and/or audio-visual works; foreign exchange rates etc.); *investment income* (influenced by prevailing interest rates and domestic licensing schemes/tariffs related to *consumer price inflation rates*).

71. *Common factors* in CMO **expenditure control** include: *membership expenses* (influenced by number of members, works, services offered and communications); *human resources expenses* (influenced by number of staff, their location, training and skills development); *collection and legal/litigation costs* (influenced by number of representatives or agents, licensing trips and legal cases); *distribution and computerization expenses* (influenced by data availability, systems and general IT costs); *office accommodation expenses* (influenced by number of premises, size and location) and *other expenses* (influenced by such activities as marketing, professional, advisory and other outsourced services).
72. Some *factors common* to the delivery of successful **distributions** involve: *documentation data matters*, e.g. accuracy of works documentation (domestic and foreign) and members'/rights holders' data base, responsibility of members/rights holders to declare works etc.; *usage report data*, based on monitoring, capturing and matching of uses, the representativeness, accuracy and timing of receipt of usage reports; *distribution system*, which is dependent upon the availability of special application software; the clarity, complexity and uniform application of distribution rules; and *post distribution factors*, in particular member/rights holder queries and the CMO' system of claims management.

BUSINESS SUSTAINABILITY AND RISK MATTERS

73. The next step in the review process involves focusing on matters affecting the sustainability of (and giving rise to risks for) the CMO. These matters need to be listed based on certain categories identified as presenting a risk to the future of the CMO or impacting on sustainability, e.g. the legislative and regulatory environment – i.e. the impact of legislative and regulatory compliance and changes on the CMO's sustainability and risk profile; rights holder affiliation (both domestic and international) – here it is noted that if the CMO is not fully representative of rights, this may affect its ability to carry out its mandate; delivery of income and control of expenditure; licensing and distribution operations; technology and systems; the CMO's image and public standing, etc.
74. This can be done by creating a table listing the matters, key areas, the responsible person or function, how the risks will be monitored and reported



on, and the frequency of the risk review. See a possible simple illustrative table below.

SUSTAINABILITY & RISK OVERVIEW

MATTER IDENTIFIED	COMMENTS ON RISK/ SUSTAINABILITY	RESPONSIBILITY ALLOCATION	FREQUENCY & METHOD OF MONITORING
Legislative Environment	CMO dependent upon modern/defined legal/ regulatory system	Board/Member advocacy group and CEO	Quarterly legal reports
Income – Low	CMO not able to sustain operations	CEO, Licensing Executive	Monthly segmental licensing reports
Distributions	Accurate and representative; Internal/ external data integrity	CEO, Finance and Distribution Executives	Monthly reports on works documentation and usage monitoring
Public Image	...	...	...
Expenditure	...	...	...
Technology/ Systems	...	...	...

75. Where the environmental scans did not identify matters now reflected/ identified in the *sustainability and/or risk* table these would be carried over to the Gap Analysis exercise and table so as to ensure that all risk and/or sustainability areas are adequately addressed.

GAP ANALYSIS

76. A gap analysis (also termed need-gap analysis, needs analysis or needs assessment) comprises comparing the CMO’s current or actual performance with its planned, potential, or desired performance. The exercise involves an analysis and comparison of factors relating to the present situation (‘what is’ or ‘where we are’) and those required to achieve the desired objectives (‘what should be’ or ‘where we want to be’) in order to highlight gaps that need to be filled. It is about determining whether the organization is measuring up against its previous strategic plans and member/rights holder expectations, while making the best possible use of its available resources. This exercise can be carried out by creating a table of the CMO’s main critical success factors (CSFs) dealt with before, and listing them against the CMO’s strengths, weaknesses, risks and issues relating to risk and sustainability (see paragraph 75 above), categorized under ‘main themes’ and ‘secondary themes’ (in order to prioritize the areas that require the most urgent attention). A list of the identified gaps can then be established so that focused attention can be given to dealing with the gaps as identified in the table. See a possible simple illustrative table below.

COMPARATIVE GAP IDENTIFICATION

CSFs	STRENGTHS	WEAKNESSES	RISK AND SUSTAINABILITY MATTERS	KEY GAPS
<i>Main Themes:</i>				
- Infrastructure	Established CMO infrastructure	...	Need for modern systems and processes	...
- Human resources		Insufficiently trained staff	Skills shortage	...
- ICT	Availability of appropriate equipment	Lack of reliable ISP	Possibility of significant systems downtime	...
Etc.				
<i>Secondary Themes:</i>				
- Membership	Positive disposition	Diversion of attention	...	...
Etc.				

ESTABLISHMENT OF HORIZON PLAN TO ADDRESS ‘GAP’

77. The gaps identified above need to be listed against probable actions that need to be taken to address these gaps. As indicated, a gap analysis deals with the gap between where the organization is and where it ought to be. In order to bring the CMO to where it ought to be, a horizon plan, listing specific *goals and objectives*, and indicating specific actions that need to be taken and tactics that must be followed, needs to be developed.
78. *Goals* are normally the predominant principles which guide the CMO’s main decision making whereas *objectives* tend to be more specific, measurable actions that may be undertaken to meet the stated goals. To evaluate the plan’s progress, it is important for goals and objectives to be measurable. A popular mnemonic used in many planning sessions is the SMART acronym. SMART normally denotes that the goals and objectives should be: **S** – specific; **M** – measurable; **A** – attainable, **R** – relevant and **T** – time based. This expresses the fact that the goals and objectives are to be achieved over a particular period – namely the time it would reasonably take for the CMO to achieve the stated goals and objectives taking into account the imminence of the threat or risk of not doing so. For example, how long would it take for the CMO to license a critical user, whose unauthorized usage of recordings is affecting the welfare of members?
79. There are various methods used to consolidate all the strategy development inputs assembled during the review exercise. A possible simple illustrative table is provided below.



MAJOR GOALS/OBJECTIVES MATRIX

GOALS	OBJECTIVES AND ACTION ITEMS	RESPONSIBILITY ALLOCATION	TIMING (DATES)	BUDGET IMPLICATIONS
Increase Income	Draw up a Formal Licensing plan by Income segments	Licensing Executive	Within 2 weeks of plan adoption	Estimates in currency amounts
	– Broadcasting <ul style="list-style-type: none">• Radio• TV	Broadcast manager	...	...
	– Public performance <ul style="list-style-type: none">• Major Users• Zone/region	Public performance manager	...	...
	– Communication to public <ul style="list-style-type: none">• Streaming• Downloads	New media manager	...	...
	Private copy (PC)	PC manager	...	...
Etc.				
Reduce Expenses	Identify all major cost centers	Finance Executive	Within 3 weeks of plan adoption	...
	Review major line items	Financial accountant		...
	Prepare cost benefit analysis	Management accountant		...
Etc.				

FINANCIAL BUDGETS/PROJECTIONS

80. Having undertaken the activities and processes dealt with above, it would now be crucial to develop a budget/financial projection, which considers the CMO’s *income and expenditure forecasts, probable distributable revenue* and *possible future cash flow statement* based on the CMO’s current business model and any future or diversified business model (as dealt with under 71-73 above when identifying the critical success factors).
81. The **income** should be broken down into (i) the rights or works administered; (ii) market segments (e.g. broadcasting, public performance, communication to the public, new media/digital, private copy, international/foreign, investment etc.) as well as by economic/geographic regions, both in respect of the current business model and the possible future or diversified business model. The **expenditure** should be forecast based on the major cost centers identified when dealing with the CSFs above (e.g. membership expenses, human resources expenses, collection and litigation expenses, distribution and computerization expenses, accommodation costs etc.), and could also (in respect of both the current business model and the future or diversified business model) be dealt with in relation to the main areas

of business operations (front office, back office, common or centralized services, management and outsourced services). The expenditure budget would include a separate section for *capex* (capital expenditure) costs based on both the current and future business model. Budgeting in respect of **distributions and improvements** needs to take into account the data base operations of existing administration of works and the members'/ rights holders' interests as well as the administration of any future rights/works¹⁶⁸ and the frequency of distributions (how long it takes the CMO to make distributions and the interval between collections and distributions). The budget would also include consideration of any specific hardware, software and systems networking improvements/refinements that have been planned for. A probable *future cash flow statement* could also be generated using a reliable financial model such as the discounted cash flow (DCF) model.

STRATEGY IMPLEMENTATION

82. Having undertaken the above activities, the CMO's strategy is now ready for implementation. The strategy must be implemented (i) based on specific goals and objectives; and (ii) based on major CMO functions.

2.21 Specific Goals and Objectives

83. Key actions and tactics must be identified in relation to each goal and objective. It is common to express each action and/or tactic using a verb rather than using a noun (e.g. 'identify' rather than 'identification'). It is also important to ensure that the actions concerned are SMART actions/tactics as mentioned above. Responsibilities for each action must be allocated to particular departments or functions within the CMO (and sometimes to specific individuals within such departments or functions). Target dates have to be set within the period covered by the horizon plan. The cost and budgetary implications of each action then needs to be reflected. To further facilitate focus on the budgetary implications, various objectives and actions can be grouped or classified into whether the cost implications are anticipated to be high, moderate or low.

2.22 Major CMO functions

84. The strategy can also be implemented based on major CMO functions such as (i) repertoire representation; (ii) revenue generation; (iii) distribution, which involves usage monitoring, pooling of income streams, database operations, works documentation and distribution software applications based on the

¹⁶⁸ In respect of future rights this can only be done if the acquisition of the rights is imminent or if a clear, achievable plan of acquiring such rights is in place.



CMO's membership and distribution rules (e.g. in relation to the share splits applicable between the publisher and author/composer, in the case of musical works, and between the various parties – producer, director, screen writer etc. – in the case of audio-visual works, in respect of royalty payments); (iv) legislative and/or regulatory reform, and (v) communications or public affairs (which must deal with the strategy both in respect of rights holders and other stakeholders). Clearly articulated actions must be formulated in respect of each of these functions.

85. It is acknowledged that the challenge for CMOs lies not only in the development of appropriate strategy but also in sound implementation of an adopted strategy. Strategy implementation involves change. To ensure that the momentum of strategic initiatives is not lost in the face of any changes required at the implementation stage, a set of *short term/quick wins* are also often identified. *Quick wins* are goals/objectives which are part of an adopted strategy but identified as those which are generally achievable/deliverable in the short run. The achievement of these would give the CMO and its staff a taste of success providing motivation in the early stages of the strategy implementation.¹⁶⁹

EXECUTIVE SUMMARY

86. Once the plan has been finalized and has incorporated all the above-mentioned aspects, an *executive summary* needs to be prepared and inserted in the beginning of the strategy plan. The executive summary is an important aspect of the strategy plan and sometimes considered to be the most important section of the plan. It provides a synopsis and overview of the plan and highlights its key features and is the first part of the plan that many will read.
87. The executive summary needs to be brief and to the point. It must cover the *market analysis* conducted in the strategy process. The *main issues* reviewed and dealt with in the strategic plan must also be highlighted, as well as the *proposed solutions* and/or *objectives*. The summary must highlight the various *stakeholder relations and alliances* as well as the CMO's *business systems and processes*. The *risks and opportunities* identified must also be made explicit to provide a snapshot of the CMO's competitiveness. A short *financial summary* of the plan will be included with projected incomes, expenditures, distributions and a separate estimation of capital expenditures. The financial summary may also include any major cash flow implications for the CMO. Last, but not least, an organogram showing the CMO's *management team and board* needs to be included (although this may also be included at the beginning of the executive summary).

¹⁶⁹ See Kotter JP *Leading Change* (Harvard Business Review Press Watertown 2012), generally.

SCHEDULE OF SIGNIFICANT TOOLS IN UNIT 2

- Re-confirmation/Revision of CMO Vision, Mission and Values/beliefs
- Stake Holder List and ‘Requirements’ Table
- Five Key Environmental Scans Summary
- SWOT Analysis
- CMO Services – Primary & Secondary
- Critical Success Factors Summary
- Business Risk & Sustainability Table
- GAP Analysis & Key Goals Summary
- Financial Forecast
- Executive Summary

LIST OF REFERENCES

Collins JC and Porras JI ‘*Organizational Vision and Visionary Organizations*’ 1991 California Management Review (34:1) 42.

Fernando AC *Corporate Governance – Principles, Policies and Practices* (Dorling Kindersley Dehli 2006)

Ficsor M *Collective Management of Copyright and Related Rights* (WIPO Geneva 2002)

Gervais D (ed) *Collective Management of Copyright and Related Rights* (Wolters Kluwer The Netherlands 2010)

Kotter JP *Leading Change* (Harvard Business Review Press Watertown 2012)

Manley M *The Leadership – Building Leadership Structure and Styles for the Great Journey* (Crucial Publishing Hilton 2012) 46 – 48.

Maxwell JC *What every Leader needs to Know 101 Series* (Maxwell Motivation Inc. Georgia 2003)

Nanus B *Visionary Leadership* (Jossey-Bass Publishers San Francisco 1992) 8.

Spedding LS *Due Diligence and Corporate Governance* (LexisNexis Croydon 2004)

Wixley T and Everingham G *Corporate Governance – A Practical Guide for Effective Implementation* (SiberInk Claremont 2005)

Zott C and Huy QN ‘*How Entrepreneurs use Symbolic Management to Acquire Resources*’ 2007 Administrative Science Quarterly (52:1) 70 – 105.



UNIT 3

SOCIETY TARIFF DEVELOPMENT AND LICENSING PRACTICES FOR INTERMEDIATE CMOs

A. TARIFF DEVELOPMENT:

1. The importance of developing tariffs that adequately reflect market conditions while ensuring proper and fair remuneration of rights holders cannot be overemphasized. The CMO's ability to license users will to a large extent be dependent on having a broad 'arsenal'/assortment of tariffs that adequately reflects the CMO's marketing strategy and market segmentation. It is in this regard important to keep in mind the fact that, in many jurisdictions, CMOs are *de facto* monopolies. It is a well-known fact that markets and regulators do not favor monopolies. For this reason, it would be important to have a proper and indeed 'scientific' approach to the design of tariffs and the licensing and administration of the CMO's rights, thus justifying the CMO's licensing endeavors.¹⁷⁰ Such an approach needs to take into account appropriate legal, economic and marketing considerations. In view of this, the following discussion aims to highlight some of the factors and considerations that need to be taken into account when developing a CMO's tariffs.

3.1 Nature of Collective Management Organization

3.1.1 Historical Models

2. Historically the *legal form* of the CMO, i.e. whether it is a private, voluntary CMO; whether it is a statutorily-regulated CMO (based on either voluntary membership or functioning as a monopoly); or whether it is an entity forming part of the state administration has had implications on the tariff levels set by the CMO concerned. Tariff levels have also been influenced by *whether the CMO is a single-work or multi-work CMO or whether it is a uni-disciplinary or multi-disciplinary CMO*. In other words, with respect to the bundle of rights relating to the work administered by the CMO, does the CMO administer only one of the rights – e.g. mechanical rights – or does it also administer other rights e.g. performing rights – or other rights within the bundle of rights in a musical work (or in the case of audio-visual works, is the CMO concerned with only broadcast rights, or does it also administer other

¹⁷⁰ It is of course easier to adopt a 'legalistic' approach and argue that users are *obliged* to procure licenses from the CMOs. While this may be technically correct, a poorly-researched tariff may create impediments for the CMO in its licensing endeavors (e.g. resistance from users, protracted court cases, waning public support etc.).

rights, e.g. mechanical rights, rental rights, private copy etc.)? Does it only administer the rights of a certain category of rights holders or does it do so on behalf of several rights holders?

3. *User requirements* have also necessitated a certain degree of co-operation between separate CMOs (where these exist) administering different bundles of rights.

3.1.2 More recent developments in user markets

4. One of the effects of recent developments in user markets having an impact on tariff development is the phenomenon of *convergence of rights and works* used in the digital environment (see Unit 1 for further information in this regard). Parallel to this is the existence of *new, market-driven online and other new media user models* which have resulted in a variety of multi-media offerings that have created further licensing challenges. This is because the various components of these offerings are owned or controlled by a diverse number of rights holders while some of it is *user-generated content* (which often gives rise to legal problems of unauthorized adaptation of works). There is also the difficulty in determining the party liable for copyright infringement or where infringing acts took place – important considerations when thinking of instituting infringement action since copyright largely remains a territorial system (i.e. there is no uniform international system of copyright applying equally in every country).¹⁷¹ Conversely, the territorial nature of copyright has created difficulties in the effort to enforce the protection of these rights in the online and new media environment. To counter these developments, some jurisdictions have responded by creating single CMO operations that administer two or more sets of rights, while in other jurisdictions alliances have been formed by existing societies to ensure the effective administration of rights.¹⁷² The existence of multi-work or pluri-disciplinary CMOs (i.e. those administering more than one set of rights) is more common in some civil-law jurisdictions as well as in certain African, Asian and Latin-American markets.

3.1.3 Cross-border arrangements

5. The tariff structure used by a CMO will also be influenced by the unique conditions that exist within the economic market in which it operates.¹⁷³

¹⁷¹ The European Union, which is seen as a single community of countries, is an obvious exception in this regard.

¹⁷² Some existing CMOs administering different sets of rights have seen the need to form a neutral, licensing agency which is responsible for negotiating with users in respect of all the rights represented by the CMOs concerned, issuing licenses and collecting fees, which are then passed to the different CMOs depending on the rights exploited.

¹⁷³ Some major economic markets include the EU, North America, Mercosur, ASEAN etc.



A response to the digital revolution has led to increased efforts to license works on a *multi-territorial basis* within major economic markets. This has been notably so in the EU since the promulgation of the EU Information Society Directive.¹⁷⁴ Nevertheless, on a world-wide basis the question of territoriality in copyright law remains a complicating factor in efforts to implement multi-territorial licensing schemes. This has led to the conception of a number of models aimed at dealing with this problem, amongst them the so-called '*spoke-hub*' model of copyright licensing. An example of this is the model proposed in the so-called Hooper Study in the UK, which has proposed the creation of a UK-based copyright hub, having as its spokes 'the growing national and international network of private and public sector digital copyright exchanges, rights registries and other copyright-related databases' and 'using agreed cross-sectorial and cross-border data building blocks and standards, based on voluntary, opt-in, non-exclusive and pro-competitive principles.' The hub would serve copyright licensors on the supply side and copyright licensees/user on the demand side and would focus on the 'very high volume of automatable, low monetary value transactions coming mostly from the long tail of smaller users – the small digital start-up company wanting to use music and images and text creatively for its customers, the teacher in the classroom, a user posting a video on YouTube', rather than the 'low volume of customized, high monetary value licensing transactions at the top of the market (for example, Universal Music Group's licensing of Spotify)'.¹⁷⁵

3.1.4 Bundle of Rights Administered

6. Another consideration to make when developing a CMO's tariffs is the nature of the works administered by the particular CMO, the bundle of rights involved in respect of each work and the scope of each right. This issue is briefly considered below in light of the works we are dealing with.

¹⁷⁴ Directive No. 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, available at <http://www.wipo.int/wipolex/en/details.jsp?id=1453> (Accessed 03/02/2015). See further, in this regard, the recent joint venture between PRSfM, STIM and GEMA in relation to multi-territorial online music licensing and copyright administration services, available at http://europa.eu/rapid/press-release_IP-15-5204_en.htm, as well as the provisions relating to the multi-territorial licensing of musical works in the EU Directive on Collective Management of Copyright and Related Rights, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0026> (accessed 01/12/2015).

¹⁷⁵ See the Hooper Study at <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/dce-report-phase2.pdf>, paras 7 – 8. (Accessed 03/02/2015).

3.1.5 Musical Works

7. In the case of musical works, the bundle of rights will of course include performing rights and reproduction rights (including in some cases private copy royalties/levies). As discussed earlier, *performing rights* encompass broadcasting rights (both terrestrial and satellite), cable retransmission/diffusion, public performance and other forms of communication to the public. *Reproduction rights* encompass the traditional reproduction and distribution of physical recordings, the increasing ‘digital products’ market and in certain cases private copy remuneration. In the case of traditional reproduction/distribution, the situation will of course depend on whether the system applicable is based on the civil code with its emphasis on authors’ rights (where CMO involvement is prevalent) or if it is based on the common law (where publisher arrangements often take precedence). Hybrid systems are also prevalent, e.g. where, in the case of the common law regime, publishers form CMOs to administer the rights on their behalf (at times permitting membership by individual authors), and where, in the case of the civil code, publishers play a less or greater role in CMOs. What is obvious however is the fact that there is a growing trend to administer these rights through the CMO system.
8. In the digital environment, rights holders tend to demand more control of the administration of their rights, although the role of CMOs in offering a centralized system of rights clearance is increasingly recognized. This means that the development of tariffs for digital usage may no longer be the exclusive domain of CMOs and that rights holder groups may be more actively involved in the process. The ‘making available’ right has become very important in the digital environment as it enables rights holders to license the usage of their works whenever they are made available to the public, whether by wire or wireless means, ‘in such a way that members of the public may access them from a place and a time individually chosen by them.’¹⁷⁶ In essence, this relates to on-demand access of works through both streaming (as part of the communication right) and downloads (as part of the digital distribution right). In regimes which recognize *private copy levies/royalties*, tariffs are often developed and issued by designated government bodies (e.g. the Copyright Board in Canada).

3.1.6 Audio-visual Works

9. As dealt with in Unit 1, audio-visual rights are treated differently in different jurisdictions, especially between civil code and common-law jurisdictions.

¹⁷⁶ See Article 8 of the WCT.



However, even within jurisdictions following a similar legal system, there is no uniformity with regard to the manner in which the rights are dealt with, in particular with regard to the question of authorship and ownership of the rights.¹⁷⁷ Generally, civil law jurisdictions recognize the director and screenwriter as authors (with other national legislations according authorship or co-authorship status to others such as music composers, cinematographers, designers and editors), while in common-law jurisdictions a lot depends on contractual arrangements, with the producer most often recognized as author. As also dealt with in Unit 1, other regimes make provision for a presumption of transfer of rights to the film-maker and/or producer. However, even in such cases it is possible, by negotiation, for some creative contributors to reserve certain of the rights. This situation clearly makes reciprocal representation in respect of audio-visual rights complex (the system of one CMO may not be adapted to the rights controlled by another CMO). In some jurisdictions, a system of compulsory management in respect of audio-visual rights exists, while in others it is left to rights holders to voluntarily establish CMOs through contractual arrangements.

3.1.7 Rights Representation/Acquisition of Rights

10. Tariff development will also be influenced by the manner in which a particular regime deals with the issue of ownership of rights. For example, the choice of user markets that must form the subject of tariffs will be determined by the rights represented by the CMO concerned (and by extension the rights holders of these rights). In many jurisdictions, the author is regarded as the owner of copyright in his works, unless he has assigned ownership of copyright to others (where this is permissible).¹⁷⁸
11. It is also important to note that many times authorship is extended to persons who are not the original authors of a work but who make adaptations of the work to create other original works (e.g. arrangers, translators etc.). The making of such adaptations of original works often creates new markets in which the adapted versions are exploited. So, for example, a literary work that was originally created for the book publishing market may be adapted to a dramatic work or to a film, thus giving rise to new markets of exploitation and the need to develop tariffs in respect of such usages.¹⁷⁹ One work may

¹⁷⁷ See in this regard a White Paper of the Society of Audiovisual Authors (SAA), at 9 – 11, where the problem of 'limited harmonisation' within the EU regarding the question of authorship is referred to. Available at http://www.saa-authors.eu/dbfiles/mfile/1900/1913/SAA_white_paper_english_version.pdf (Accessed 05 February 2015).

¹⁷⁸ Some jurisdictions such as Germany do not permit assignment of copyright.

¹⁷⁹ This becomes particularly the case in respect of multi-purpose CMOs that must ensure that all usages arising from the rights that they represent are adequately licensed.

also have several co-authors (e.g. in an audio-visual work persons recognized as authors may include the director, scriptwriter, author of the adaptation, author of the dialogue etc.¹⁸⁰). The author may also transfer ownership of copyright to another party (e.g. a composer may assign his mechanical rights to a music publisher). In contemplation of this situation, it is often said that the author is the ‘first owner’ of copyright, as this ownership may be further transmitted to others who may also transfer it to other parties and so on (especially in common law jurisdictions).

12. The acquisition and/or representation of rights has an impact on the level at which tariffs are to be set (i.e. the level of tariffication). This is because the rights controlled or represented by a CMO will influence the CMO’s decision on market segmentation. Thus where the CMO controls or represents the rights of major rights holders (or rights holders representing the most exploited works) this is likely to give the CMO leverage to prioritize major users of music in the domestic market. The CMO would of course control these rights either through assignments, licenses or agency arrangements (which, in the case of international rights is usually achieved through bilateral reciprocal agreements with foreign CMOs, through agreements with domestic representatives of foreign rights holders or through direct representation of foreign rights holders.)

3.1.8 Value of Rights, Establishing a Hierarchy and Best Practices

3.1.8.1. Value of Rights

13. The attachment of value to copyright works is an important consideration in the development of a CMO’s tariffs. It is true that copyright is a right afforded by law and that, on this basis, users of copyright works are *obliged* to pay rights holders when using the works. Nevertheless it is important not to use a heavy-handed approach towards users and to expect them to unquestionably accept any license fee that the CMO conceives. The CMO must be able to prove that its tariffs were not arrived at lightly and that a ‘scientific approach’ was used to arrive at each tariff in respect of all usages. This of course is based on the premise that both musical and audio-visual works have a determinable value, which, in many cases, is of an *economic nature* (i.e. it leads to the *improvement* of the economic position of users of

¹⁸⁰ See http://www.saa-authors.eu/dbfiles/mfile/1900/1913/SAA_white_paper_english_version.pdf (Accessed 05/02/2015).



these works).¹⁸¹ The point of departure therefore is that users must pay for their usage of copyright works because these works constitute someone else's property; however, the level of payment will be dependent on the value to be attached to the particular usage, as determined through the tariff development process. As is common cause, economic exploitation gives rise to the establishment of pricing systems.

14. The historic view is that the pricing value to be attached to the exploitation of a cultural product is the ability to participate by way of a 'proportion' of the economic proceeds derived from such exploitation.¹⁸² On a legal basis, the standard that has often been used by courts and tribunals is that of a 'reasonable royalty'. The rights holder must prove that the royalty is reasonable under the circumstances. In order to satisfy this requirement of reasonableness, it becomes necessary to employ more 'scientific' methods of valuation in the process of tariff development. If the CMO has not taken care to employ credible methods in arriving at its tariffs (where possible through negotiation with users), the matter may be left to courts and tribunals to determine, at times giving rise to skewed outcomes (i.e. outcomes that are 'inconsistent and lack robustness').¹⁸³ It has in this regard been argued that the systematic analysis of legal determinations does not always provide a good estimate of true value and that better estimates of value are therefore needed. The following have been identified as some of the options that can be considered when attaching value to the use of recorded music (and arguably, other copyright works):¹⁸⁴

- a. The use of economic analysis

15. The use of economic analysis is commended for providing a paradigm that sets out a logic lacking in legal analysis, and which aligns with the economic

¹⁸¹ In this regard however care should be taken not to place too much emphasis on economic value, as users are generally also required to pay for the usage of copyright works even when the purpose of such usage is non-profit. Unless a particular national regime exempts such non-profit usages from copyright liability, the usages would normally also require authorization, and at times, payment. This is because although the user may not be deriving economic value from the usage of the works, some other value will be derived from the exploitation of the works, e.g. *experiential value* or some form of *sentimental value*.

¹⁸² See Petri G *The Composer's Right a History of the Value of Music* (Atlantis Stockholm 2002) in general.

¹⁸³ See PricewaterhouseCoopers (PWC) 'Valuing the Use of Recorded Music' July 2008, at 2. Available at http://www.ifpi.org/content/library/Valuing_the_use_of_recorded_music.pdf (Accessed 6 February 2015).

¹⁸⁴ See PWC study *ibid*, generally. Although the options dealt with in this study are seen as options that would be used when determining the reasonableness of a royalty at a tribunal or court hearing, it is submitted that taking these considerations into account when developing tariffs will place a CMO in a better position to prove the *reasonableness* of a tariff, which is often a review of the steps that were taken by the CMO concerned when developing the tariff.

policy underlining copyright law. Furthermore, economic analysis assists in identifying relevant facts and in dispelling preconceived and subjective assumptions.

b. The use of comparable market prices

16. This has to do with the use of ‘benchmark studies’, where tariffs/royalty rates that are the outcome of tariff negotiations in comparable markets are considered. An analysis of this nature is useful in that it enables the CMO to analyze various usages and to determine how value was attached to such usages. There will likely be a cost implication for a CMO in procuring independent studies published in this regard. Much of the information may also not be publicly available and the CMO may have to depend on its relationships with the target CMOs in order to have access to such information. It would also be important to carefully identify appropriate ‘comparator market environments’, something that may not be easy in view of the uniqueness of each market. For example, it is not enough to use as a comparator market ‘another developing country’ where the CMO concerned is from a developing country, since there may be significant differences in the manner in which rights are administered in the two markets. Of particular importance is a consideration of the issue of ‘freedom to negotiate’. Were the tariffs in the comparator market determined through willing negotiations, or were they as a result of the abuse of a dominant position by the target CMO (or government influence in the negotiations)? It is clear therefore that what the comparative analysis must do is that it must, as much as is possible, ‘compare apples with apples’. Furthermore, it is important to ensure that the data that is being compared is still relevant and/or up-to-date. Quite a number of CMOs have made their more popular tariffs accessible from websites.

c. Analysing the Value that Copyright Works Add to Businesses

17. One of the ways in which the value of copyright works can be determined is through analysing how using such works by a business adds to its turnover. This can be done through the use of data that is capable of supporting this notion. It can be demonstrated how music or audio-visual works aids the growth of business income and financial analyzes can be conducted to show increased income in various situations within a particular territory. It may be possible to show a correlation between revenues earned and copyright usages. The comparison can then also be extended or converted to alternative or substitute scenarios – such as considering what the situation would be if the music or audio-visual works used were royalty-free music (considering that such music or audio-visual works are in many cases not



well-known by the public); as well as considering what the situation would be where no music or audio-visual works were used at all.

d. Impact of Music Usage on Behavior and Preferences of Consumers

18. The value of music can also be determined by assessing the impact of music usage on the behavior and preferences of consumers. This can be done by analysing studies relating to the usage of different types of music and the resultant economic benefit to the user.¹⁸⁵

e. Adopting a Specific Value Approach

19. In the end, it would be important to choose a specific value approach that the CMO will use in particular circumstances. For example, a flow chart can be used in the tariff development process to determine what approach to use in respect of a particular music usage (e.g. the comparable market outcomes approach can be used in respect of all industries, if such comparison exists, and the usage analysis and financial analysis would be used in respect of radio and television usages, etc.).¹⁸⁶

3.1.9 Establishing a Hierarchy of Values

20. In determining the value to be attached to a particular usage of rights (and thus what the applicable tariff is), it is often important to do so using a hierarchy of value attribution/allocation. The notion of differentiating the allocation of value is one that is used on the basis of the type of the product or service concerned and/or the degree of the usage of rights. Market precedents of price discrimination between various types of goods and services can also be used in the allocation of value in respect of such goods and services. Hierarchy can be determined in the following manner in relation to the following aspects/areas:

a. Business

21. In respect of business a hierarchy can be established based on (i) essential use (attracting the highest value allocation), (ii) necessary use (attracting moderate value allocation) and (iii) incidental use (attracting lower value allocation).

b. Rights

22. Hierarchy-based value attribution can also be done from the perspective of the rights themselves, where the categorization is based on (i) featured

¹⁸⁵ Some of the studies that have been conducted in this regard in the UK may be read at <http://www.musicworksforyou.com/about/musicworks>

¹⁸⁶ See PWC study *ibid* at 48 – 50.

use, which attracts a higher value allocation¹⁸⁷; (ii) semi-featured use, which attracts a moderate value allocation¹⁸⁸ and (iii) background use, which attracts a lower value allocation.¹⁸⁹

c. Operations

23. A hierarchy can also be determined on the basis of the particular operations of the user concerned, e.g. whether the operations are (i) music-intensive or (ii) where music forms the focus of a general entertainment operation, or (iii) where music only forms a secondary role of a general entertainment operation,¹⁹⁰ or (iv) where the operations are not directly concerned with music and music is only used occasionally.

3.1.10 Best Practices

24. Generally many medium to small market CMOs do not give sufficient attention to the *science* of value attribution in the formulation of the CMOs' tariffs. Instead, the formulation of tariffs is often determined within the general rubric of 'best practice', taking into account such considerations as (i) estimates of market size (i.e. comparing the market size of one CMO with that of another), (ii) the initial research conducted and the start-up capital available, (iii) the legacy of the particular CMO (i.e. 'how things have always been done') and (iv) domestic and/or regional precedents.
25. It is recommended that CMOs should devote time, care and attention in establishing the value and hierarchy principles dealt with above when developing tariffs. Thus, to arrive at a more justifiable or 'reasonable' tariff, it would be important to make use of a combination of various 'value determinants' based on (i) economic science, (ii) tribunal and other judicial

¹⁸⁷ For example, where the usage is *predominantly* in respect of a particular set of rights (whether in respect of musical works or audio-visual works) the usage of the rights concerned would be a featured usage. This is not only important in determining which rights holders to pay in respect of a particular usage but also important for the purposes of determining which value to attach to the usage. For example, a higher value is usually attached to the live performance [featured use] of a musical work vis-à-vis the public performance of a musical work contained in a soundtrack of a film [background use].

¹⁸⁸ A radio show featuring both music and phone-in talk formats can, for example, be seen as a semi-featured use of the music.

¹⁸⁹ An example of background use is in the case of a restaurant playing music in the background to create ambience. The restaurant's business is not concerned with the playing of music but with the selling of food. The restaurant's business can therefore, continue without the playing of music, although customers may prefer to go to another restaurant using music because of the ambience that the music creates.

¹⁹⁰ For example, a music retail store can be said to be a music-intensive operation, because its sole aim is the *sale* of music (just as a DJ's business is music-intensive because it is solely based on the performance of music; and the rental of videos is an intensive operation for a video-rental shop). On the other hand, the playing of live music in a restaurant club can be seen as general entertainment, as the playing of music is generally not the main aim of the club.



precedents, (iii) the value added to the user business/undertaking and (iv) comparable market prices. To be sufficient, the best practice exercise needs to take into account all of these various value determinants (i.e. best practice). The use of a best practice template would be of assistance in this regard. The best practice template would be used as a comparative tool to assist with identifying the degree of correlation between *like* markets based on CMOs in the region and those in other regions of the world. It is a broad market assessment based on the use of a table with columns for the *Tariff* in question, the *Jurisdiction* being considered and the *Law* applicable in such jurisdiction (what could be termed a TJL column), with another column reflecting any *Precedents* (tariffs, licensing policies etc.) available from such jurisdictions. This will assist in the process of the choice of those jurisdictions that are appropriate market comparators for the CMO carrying out this exercise, with an emphasis on choosing only those markets that have like characteristics to those of the CMO concerned.

3.1.11 Pricing Parameters, Types of Pricing and Practices

26. Tariffs are generally set on the basis of certain parameters or measures/ criteria of assessment. In general, tariffs are based on one or a combination of the following:

3.1.11.1. Pricing Models

- a. Revenue or Expenditure-based Models
- 27. This normally applies in respect of essential or featured usages. In this case, the tariff will be a percentage of a user's revenue, expenditure, operating budget, price-to-consumer and/or ancillary revenues (or any combination of these). In this regard, clear definitions must be devised to explain what is meant by revenue and/or expenditure in respect of wholesale, retail or dealer prices. For example, 'revenue' may be defined to exclude agents' fees and promotional fees, or a certain percentage thereof. In such models, most CMOs reserve the right to insist on a certificate of revenue, expenditure or operating budget (duly certified as correct by an acceptable authority) – others seek the right of 'audit' as a standard term.
- b. Fixed-fee-based Models
- 28. Fixed-fee based models are normally used in respect of necessary or non-featured uses and possibly some semi-featured uses. These are used with reference to certain fixed or ascertainable parameters, e.g. in the case of public performance the parameters would include measured areas, number of employees, seating/dancing capacity, frequency of events (hours per day,

days per annum etc.) and number of subscribers/viewers/listeners, etc. In the case of mechanical rights in musical works, the parameters include the number of tracks reproduced in the recording, the number of 30-second slots reproduced or aired, the number of downloads etc. In some audio-visual societies, an alternative broadcasting model on revenue or expenditure is considered, namely a fee per minute. In most fixed-fee based models, the stated monetary amounts are usually linked to movements in retail and/or consumer price indices. This is to ensure that rights holders are compensated adequately for any loss/gain in the value of money over time.

3.1.11.2. Parameter Practices

The detail of the parameter definitions and terms which both models may take into consideration as well as their complexity or simplicity to administer (for both CMO and user) are dependent upon local considerations. Domestic market conditions, negotiations with users or representative associations of user groups, may in the event provide pricing parameters contained in a CMO's Tariffs which can vary from country to country.

3.1.12 Tariff-Setting and License Scheme Essentials

3.1.12.1. Tariff-Setting

29. We have looked above at some of the theoretical considerations that need to be taken when developing a tariff. On a practical level, developing (or setting) a tariff generally involves three steps, namely:
 - a. Overall Market Analysis, Segmentation and Estimation¹⁹¹
30. In relation to this issue, it is important to have a clear understanding of the rights applicable, the application of the rights (i.e. the manner in which they are used) and the user's actual business model. For example, is the usage a simple (or single), 'once-off' usage, or does it lead or give rise to other usages, e.g. the so-called *upstream v downstream* usages,¹⁹² or requires *multi-licensing* (e.g. in the case of an audio-visual work where a clearance of rights in respect of several works – e.g. literary work, musical work, performers' rights, film rights etc. – is required). In this regard, it needs to be

¹⁹¹ See Unit 5 for a discussion of this aspect.

¹⁹² For example, a composer who is 'hired' (or commissioned) by a broadcaster to compose a musical work for a television series would be paid money for composing the music (upstream usage) but would also be entitled to earn performing rights from the broadcast and subsequent public performance of the musical work (downstream usage). In jurisdictions which recognize broadcast mechanicals the composer would be entitled to earn income when his composition is converted into broadcast format (upstream usage) and whenever it is used in a broadcast (downstream usage).



noted that a work intended for one market has the potential of being used in other secondary markets (e.g. a musical work used in a sound recording can subsequently be used in an audio-visual work, and an adaptation of the musical work in another musical genre – thus another market – can be created). These considerations are important especially for multi-purpose CMOs that must take this into account when developing tariffs and issuing licenses.

b. Formation of a Rights Market Usage View

31. Regarding this issue, usages need to be reduced into ‘usage essentials’, i.e. breaking down a particular usage into its basic elements in order to understand fully what the usage entails. Failure to do so may result in the issuing of a license that does not adequately reflect the usage, thus resulting in rights holders not being paid reasonable or equitable remuneration. Those formulating tariffs need to confirm that their understanding of what the usage entails is correct by, for example, consulting with user groups or trade associations (including for example retired executives from the industry concerned, who may no longer feel obligated to ‘keep secrets’). Seeking legal counsel in order to understand the legal categorization of the particular usage is also often crucial, particularly with regard to understanding the various layers, types or bundles of rights involved.

c. ‘Location’ of Tariff

32. Having undertaken the above actions, it would now be easy to ‘locate’ a particular tariff within the overall hierarchy of other existing tariffs. That is, it would, for example, be possible to determine if the tariff relates to *essential use*, *necessary use* or *incidental use* and thus what price level should be allocated to the particular usage. In the end, the CMO will have an arsenal of tariffs ranging from those that relate to high-value usages, medium-value usages or lower-value usages. This will also assist in the licensing strategy implemented by the CMO.

3.1.12.2. Private Copy Rate Setting Arrangements

33. The determination of rates of charge or fees payable varies from country to country and also with regard to which products are levied. It has been noted that there are some four common practices of rate setting¹⁹³, namely:
- a. Direct state intervention,
 - b. Negotiation between industries and CMOs,
 - c. Special government appointed body, and
 - d. Set by law after rights holder representations and/or negotiations.

3.1.12.3. License Scheme Essentials

34. Having now developed various tariffs for the CMO in respect of different uses, it becomes necessary to convert the tariff into a license or licensing scheme (i.e. the manner or framework in which the tariff will be implemented). A license scheme takes into account the various essential terms that must be included in a license agreement entered into between the CMO and a user. The following are some of the more essential aspects of a license scheme:
- a. Scope of rights or works covered
35. The license scheme needs to clearly indicate the scope of the rights or works that the tariff is based on, i.e. whether this relates only to one set of rights in the bundle of rights relating to a particular work (e.g. whether the tariff relates to reproduction rights in musical works – and then whether these are mechanical rights, synchronization rights etc. – or if it relates to performing rights) or whether more than one category of rights and works (e.g. musical work, audio-visual work, sound recording) is envisaged, as would sometimes be the case with multi-purpose societies. There needs to be a clear delineation in this regard and the rights and works involved need to be clearly identified in the license. It also needs to be clearly indicated whether the tariff relates to a *transactional license* or whether it is concerned with a *blanket license*, where permission is given to use all (or most) of the works within the CMO's repertoire.
- b. Period/Term of License
36. The term of the license needs to be clearly stated. This is true in all cases but particularly so in the case of an interim/introductory or experimental scheme,

¹⁹³ See an extensive study published by Stichting de ThuisKopie (Netherlands Private copy collection organization) and the World Intellectual Property Organization (WIPO) in 2013 at http://www.wipo.int/freepublications/en/fulltext_pubdocs.jsp?q=private+copy (accessed 16 February 2015)



where certain aspects of the usage may not be clear, requiring the CMO to investigate the matter further before finalizing the scheme. Under such circumstances, it is better to offer a shorter, interim license term (say over one or two years) to avoid giving away too much over a longer period. This would also be the case where the CMO gives special rebates or a reduced license fee to a user that is struggling financially. Such an arrangement enables the user to 'get back to its feet' without the further financial strain of paying the higher copyright license fees (especially in respect of businesses whose operations are dependent on the use of copyright works), while at the same time not prolonging this arrangement, which is clearly disadvantageous to rights holders. Having said this, there is a danger that the interim license scheme can somehow morph into a final or more permanent scheme, setting a bad precedent in the licensing of the rights concerned. This is, for example, likely to be the case where the CMO does not strictly enforce the terms of the interim license, e.g. continuing to accept the interim license fee even after the end of the experimental period, or generally continuing with the current arrangement without demanding the renegotiation of terms when the term of the interim license expires. Having indicated this, in some jurisdictions CMOs only enter into formal contractual arrangements with major users; with standard public performance users being issued with an invoice from the CMO on the reverse of which appear the CMOs standard terms and conditions.

c. Territory

37. It is also important to clearly indicate the territory covered by the license scheme, e.g. is it in respect of a particular town, city or province, or is it in respect of the whole country (as in the case of a user that is a national establishment). The license fee would of course vary depending on whether only one user is licensed or whether all users in a national establishment are covered by the license. Because of the territorial nature of copyright, the license scheme is likely to cover only usages within the country in which the CMO operates, although it is possible through arrangements to extend the license beyond the CMO's national territory.¹⁹⁴

¹⁹⁴ For example, where a user's operations extend to neighboring countries the CMO in the user's home country may license usages in the other countries if (i) no CMOs exist in these countries, (ii) the CMO in a neighboring country is not functional, and an agreement has been entered into with the licensing CMO to license usages in the neighboring country and to pay over the portion arising from such usages, to the CMO or rights holders in such neighboring country, etc. In the European Union, cross-border licensing is of course required by law in certain cases.

d. The Nature of the Scheme

38. The scheme may be fixed for a period of time (e.g. three years) or subject to review at regular intervals. It needs to be clear who must give notice of termination or renewal as failure to do so may lead to disastrous effects. For example, failure to give notice of termination by the CMO may result in the licensing terms continuing for another period under current, unfavorable conditions.

e. Specific Exclusions

39. Any specific usages or other matters that the CMO wishes to exclude from the license scheme need to be clearly indicated. For example, a performing rights license will normally exclude usages in respect of *dramatico-musical works* and other *grand rights performances*. A background music license specifically excludes live performances. A phono-mechanical license may be applicable only on domestically reproduced CDs or DVDs as opposed to imported recordings. In a nutshell, the CMO can only license those rights that it has been authorized to represent by rights holders.

f. Price/Terms of Payment

40. The fee payable may be a single fee or comprise comprehensive payments based on certain applicable modalities in respect of a variety of users, uses, premises, size, extent of usage, area in which performances are audible, reproduction arrangements/modalities etc. It may also be necessary to require the payment of certain guarantees, deposits or minimum payments. Furthermore, where the fee is a nominated amount in currency, it is usually linked to cost of living and/or CPI adjustments, with upward or downward adjustments dependent upon the movement in such indices necessitating either an increase or decrease in the license fee. In the event of a default in payment, an interest or penalty may be charged for each period in which the default persists. Conversely, under certain special circumstances, the CMO may offer rebates to customers.

g. Reporting Requirements

41. Provisions relating to reporting requirements are crucial in any licensing scheme. The lack of reporting on the usage of works by users is one of the most common reasons why CMOs are not always able to distribute all license fees received from users. It is not enough that a user regularly pays its license fees, if the user does not also provide the CMO with information (using forms or formats supplied to it or approved by the CMO) on the works it has actually used. Usage reporting also enables the CMO to see if the user's use of copyright works may have increased since the previous period.



In view of this, the reporting requirement needs to be treated as a material term of the license agreement with users, with specific remedies available to the CMO in the event of default by the user (such as charging a penalty payment or requiring specific performance). Often users feel that such a requirement is cumbersome and at times costly, and CMOs must thus work with users to alleviate the burden or obligation of reporting on usages (e.g. by preparing easy reporting forms that users can use; by creating online portals where users can 'populate' usage information; by co-developing reporting formats with users or by introducing other systems that facilitate easy reporting).

h. Important Definitions

42. Both the business of a CMO and the field of intellectual property rights are all specialized fields which are not very well known. Certain terms used will be completely new and unconventional to users and thus it will be necessary to define them clearly. This includes the use of such technical parlance as 'broadcast mechanicals', communication to the public' etc. and other words or expressions which, though common, may be used in a different sense in the license scheme (e.g. the meaning of 'gross revenue').

i. Other Important Contractual Terms and Conditions

43. The license scheme will also deal with other crucial matters such as the CMO's right to audit the user's books in order to determine the accuracy of the user's reporting, warranties, indemnifications, notices, etc.

3.1.12.4. Existing License Schemes/Tariffs and Hierarchy

44. Tariff development is a critical aspect of a CMO's operations and part of the 'engine room' of its success. In view of this, it is important that a CMO's approach to tariff development is carried out with focused attention rather than haphazardly. Thus, if the CMO does not have a tariff development function, this should be created and a 'line' responsibility position be allocated in this regard. It is also important to create a tariff 'library' or database in which tariff precedents and other related documents (including the history of tariff and licensing negotiations) are securely preserved. The library should be divided into (i) domestic tariffs, where the CMO's current and legacy tariffs (as well as tariffs that are still in development, i.e. 'work-in-progress') are kept; (ii) regional tariffs (where possible), where the CMO keeps tariffs precedents from similar CMO markets, and (iii) international precedents (again if possible), which can be referred to when necessary in

order to make comparisons/correlations.¹⁹⁵ A domestic general hierarchy of tariffs also needs to be established based on the value measures chosen by the CMO as discussed above.

3.1.13 Drafting of Tariffs

45. In order to develop tariffs, a CMO needs to have some degree of representation of the rights of rights holders in its area of operation. This is particularly so in the case of voluntary systems.¹⁹⁶ Where the CMO represents by far the majority of rights in a particular area, its representation of the rights can be said to be *overwhelmingly significant*. Where it represents over 50% of the rights, its representation of the rights can be said to be *significant*, and where its representation of rights is modest, it can be said to be still building its representation profile.
46. Having ascertained its representative level, the CMO then needs to develop a *value proposition* (which will be influenced by the level of its representation of rights). The value proposition is premised on members' interests versus users' perspectives and what the market is able to bear. The CMO must develop a statement of justification for its choice of the tariff pricing model used. This justification can be based on a number of considerations, such as (i) existing tariffs in related areas of use (for example, comparing the tariff for use of a musical work in a restaurant vis-à-vis use in a similarly-sized retail store); (ii) the degree of similarity or dissimilarity with existing tariffs (in this regard any assumptions made need to be confirmed or verified, and where a comparison with precedents in other markets/countries was made, the degree of any correlation needs to be noted) and (iii) the decision whether the tariff concerned is seen as being of an interim, experimental or introductory nature (in which case the CMO may be willing to compromise on certain aspects), or whether it is seen as being final (in which case the CMO will try its best efforts to ensure that its required terms are included in the licensing scheme).

¹⁹⁵ CMOs generally function as a fraternity and many CMOs would be willing to share their information with other CMOs.

¹⁹⁶ In the case of statutory CMOs or those forming part of the state administration state, support can result in a CMO being able to license usages even where the rights the CMO represents are not very significant.



3.1.14 Pre-Implementation Tariff Considerations

47. Once the tariffs have been finalized, there are a number of questions that need to be asked before implementing them. We list some of these questions below:
1. Have members/rights holders' interests been adequately addressed in the tariffs?
 2. Has the rights market and the usage model of users been correctly understood?
 3. Has the tariff been drafted in such a manner that it is easy to understand and implement it, thus easing administrative burdens on the part of both CMO officials and users?
 4. Is the tariff legally sound (i.e. does it reflect the correct legal position in every way)? In order to determine this, it goes without saying that the legal soundness of the tariff would need to be confirmed by the CMO's legal counsel.
 5. Have all assumptions been correctly interpreted?
 6. Have the tariffs (and the values or price attached to them) been ranked correctly in terms of the system of tariff hierarchy?
 7. Have all arithmetic computations and formulae been confirmed?
 8. Have 'dry-run' tests or samples been undertaken with respect to mean and extreme examples, to test the viability of the tariffs?
 9. Where applicable, have consultations been made with members/rights holders and/or user groups? In this regard, it needs to be mentioned that being able to prove to a court or tribunal that such consultations (especially with users) did take place may assist a CMO in proving that a tariff is 'reasonable' where disputes arise.
 10. Where this is required, have the tariffs been submitted to/confirmed by the regulator? and
 11. Has a marketing and communications plan in respect of the tariff been devised?

3.1.15 Post-Implementation Tariff Considerations

48. After the new tariff has been introduced and implemented, it would be important to review its impact on the user market soon after its introduction

and over a period of time. It would also be important to review the impact or performance of the tariff in comparison with existing tariffs. After doing the review, the CMO must then take steps to respond and attend to any genuine concerns raised by users.

B. LICENSING PRACTICES

3.2 Market Analysis and Research

49. At the risk of repeating the introductory remarks in the Tariff Development section, it is important to bear in mind the fact that, in many jurisdictions, CMOs are *de facto* monopolies and that markets and regulators do not favor monopolies. For this and other reasons, it is important to ensure that the CMO takes into account sound Licensing Practices. With an established Tariff Policy and Development section, a CMO is in a better position to address its market of users and uses as well as covering some one of the key pillars of Licensing Policies and Practices. In devising a comprehensive Sales/Licensing marketing strategy, there are still a number of other factors to take into account, some of which are detailed hereunder. (It would also be helpful to read this section on Licensing Practices together with the commentary under Management reporting in the Finance section of Unit 4 and the Marketing section of Unit 5.)
50. CMOs are no different to any other business. In some cases, however, some CMOs may feel that they do not need to adopt a scientific approach to market analysis and research, to the possible detriment of their members/ rights holders. It is for this reason that we devote this section to dealing with the matter in order to present an approach that CMOs (especially new or intermediate ones) can use in this regard. In the case of a CMO, Market Analysis and Research would entail a consideration of the following aspects:

3.2.1 Segmentation of User Markets

51. Segmentation of a CMO's market refers to a strategy which involves the separation of the broad market of prospective or actual licensees or users into various categories, groups and sub-groups which can be identified as having similar or common usage attributes. Proceeding from its market segmentation, a CMO would then prioritize actions and devise strategies and tactics to address the licensing requirements of each respective market segment. Segmentation of user markets should in the least be done on the basis of (i) type of rights and/or works; (ii) categories of users; (iii) nature of uses or premises; (iv) types of licensing schemes; (v) geographical location and (vi) permutations, combinations and subsets of the above.



3.2.2 Differentiation in Licensing Schemes

a. Justification for General Discrimination

52. The terms of licensing schemes (including duration and price/fee payable, etc.) will differ from user to user (even amongst users of the same size or income range). However, this cannot be done haphazardly and there must be justification for doing so. This justification can be achieved through the (i) categorization and (ii) classification of users. CMOs attempt to address the licensing requirements of users by grouping similar users and their like uses in general categories (e.g. Broadcasters; Hoteliers; Eateries; Retailers; Conveyancers; Producers; Content aggregators etc.). It is acknowledged that such broad categorization while helpful needs to respond to more specificities within each category of users (e.g. broadcasters could be radio or television channels; hotels could be classified according to star grading or similar; eateries could be workers eating houses, cafes, steakhouses or fine dining establishments, retailers could be hypermarkets, supermarkets, furniture, clothing and fashion outlets; conveyancers could be trains, boats airplanes; producers could be major producers or independent producers; content aggregators could be those for download or streaming service etc.). Thus what is needed is not only the categorization of users but their classification also.

b. Adjustments within a Scheme

53. It may become necessary to adjust a licensing scheme with respect to certain users included in the scheme, or sections/groups of such users. However, this should only be done as a result of (i) the CMO's response to user justification for sectorial differentiation or (ii) the motivation or need for the creation of a special arrangement or scheme based on objective factors. This can be done by way of inserting a subsection in a licensing scheme to reflect the new aspects, or creating a completely new scheme to deal with the sectorial differentiation issue.

3.2.3 Market Penetration

54. The market penetration strategy in collective management is in some aspects similar to that in ordinary business. Although there are often no competitors to a society's operations in view of the general monopoly position of many CMOs, CMOs do face challenges such as instances where users prefer not to use any copyright works, or where they use works that are out of copyright or which do not attract any royalty payments (as in the case of the so-called royalty-free music). Market penetration for CMOs is still an important growth strategy relating to the marketing mix, i.e. how one can

adjust and blend the various elements or components in/of the marketing mix (price [service], promotion, placement, product, people, process and physical evidence) to gain more licensees (whether existing, unlicensed users or new users) from the market. In this regard, the question that the CMO needs to ask is what the level of licensed users is, in comparison with the total estimated or theoretical user market in each category and class of users. In doing so, the potential for increased license revenue, as well as the implications for high (or low) penetration become obvious and, subject to a cost-benefit analysis, appropriate action can be taken to achieve a desired result.

3.3 Sales Data and Analyzes

3.3.1 Sales Data

55. The importance of managing sales and licensing data cannot be underscored enough. Management of information is crucial for the success of any CMO. Furthermore, in view of the non-profit status of many CMOs, there is a further obligation to operate in a cost-effective manner while also generating growing streams of income for members/rights holders. The ability to effectively track data is a core CMO activity which should be carried out both in respect of sales/licensing reporting and rights/works reporting. Licensing databases are an essential tool to store and track information relative to users and uses. Some examples of sales/licensing data are (i) a classification of rights by types of users, (ii) a classification of rights by type of licensing scheme and (iii) sales/licensing performance based on various other measures such as areas and regions, officials, agents, other platforms and permutations and combinations of these. For more detailed commentary on sales reporting, see Unit 4 on Management Reporting and the Marketing section in Unit 5.

3.3.2 Sales Analyzes

56. Sales/licensing analysis and trends by CMOs can be undertaken on the basis of (i) licensed rights/works, (ii) weekly/monthly/quarterly or seasonal periods, (iii) geographic performance, and (iv) comparisons with other periods (e.g. movements [increases or decreases] in income derived or number of licenses issued). The analysis of a CMO's licensing activities can further be broken down into *licenses renewed*, *licenses cancelled* and *new licenses issued*. Sales Analysis is often used as a management tool to bring about remedial action, to take advantage of market opportunities and to



provide support for the CMO's fiscal planning and its optimal use of scarce resources.

3.4 Review of Complementary, Alternative or Competing CMO Services

57. It is important for a CMO to constantly recall the underlying principles of collective management and their impact on its daily operations. As is common cause, collective management involves the exercise of copyright by organizations acting *in the interest and on behalf* of a group or class of rights holders. CMOs are an important link between rights holders and consumers of their copyright works as they ensure that the rights holders *receive payment* for the use of their works. An effective licensing strategy in which tariffs and licensing schemes are correctly deployed to achieve the best benefit for rights holders is thus crucial. This is important for the success of any CMO, especially in the digital age. Although individual licensing of exclusive rights by rights holders themselves can be difficult to exercise, developments in the technological environment have made it possible to have other models of rights administration outside the need to use the system of collective management. In view of this, it behooves CMOs to focus on delivery of mandates and to guard against *pseudo-monopolistic market power presumptions*.
58. The collective management of rights has evolved to a level where several services traditionally undertaken by CMOs are now being effectively shared by or outsourced to other CMOs or 'third-party service providers'. The shared or outsourced services can include licensing, usage tracking, ICT services or the general areas of finance and legal services. In some markets, where more than one CMO exists, Memoranda of Understanding¹⁹⁷ (MoUs) have been signed to jointly license or administer common/shared users and/or user groups or to provide other services. This undoubtedly results in shared efficiencies and benefits to members/rights holders of the collaborating CMOs. In the same vein, the involvement of third-party service providers in the fields of licensing and other services may be *complementary* to CMO operations. Nevertheless, if these CMO operations are themselves weak or below acceptable standards there is a danger that the third-party service providers can eventually become an *alternative* to the CMOs, venturing into space traditionally regarded as CMO territory. For this reason, it is crucial for CMOs to focus on the delivery of their core mandate, in particular effective and efficient income generation and distribution.

¹⁹⁷ Memorandum of Understanding in the singular.

59. The possibility of *competing* CMO services is another reason why a CMO needs to be diligent in carrying out its core mandate.¹⁹⁸ Members/ rights holders have at times, either out of preference and/or dissatisfaction (e.g. because of less than acceptable service standards and/or delivery), supported the establishment of alternative or competing CMOs, with the result of more than one CMO operating in the same area or field of rights administration. To avoid confusion in the market, the competing CMOs can agree to enter into *joint licensing* arrangements in respect of common users, and to only carry out *separate licensing* where the repertoires of the two CMOs can be clearly distinguished. Even so, it is important that the tariffs of the competing CMOs are justifiable to ensure that users receive a fair service and that rights holders are remunerated accordingly.

3.5 Review and Choice/s of Licensing Channels or Structures

60. There has been and still will be a variety of channels used by CMOs to license their customers. The choice of channel is dependent upon local market conditions, ICT and the logistics available to the CMO concerned (e.g. postal and telecommunication services, bandwidth, transport infrastructure and the like). Over time, market conditions change and the channels of licensing utilized need to be reviewed accordingly. Traditionally, CMOs have employed licensing officers/inspectors, field representatives, agents and similar licensing professionals to service certain user markets. Many CMOs structure their sales/marketing efforts according to local circumstances, logistics and the channels of sales/licensing chosen. The channels of sales/licensing may include:
- a. The direct sales force (which comprises of both the general sales force and key account executives assigned to specific key customers)
 - b. Tele-marketing
 - c. Direct mail
 - d. Phone-in call centers
 - e. Walk-in customer centers,
 - f. CMO website sales (e-commerce), including the use of social media platforms
 - g. Independent agents, and
 - h. Outsourcing (e.g. to firms of attorneys in respect of particular usages).
61. Where the licensing market to be serviced covers a large geographic area the question of centralized versus decentralized modes of operations is often

¹⁹⁸ The multi-territorial licensing provisions of the EU Collective Management Directive are relevant here for European CMOs. See, in this regard: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0026> (accessed 01/12/2015).



considered. In this regard, a choice needs to be made as to which sales/licensing channels to retain as part of centralized operations, and which channels to use in the decentralized operations. Decentralization may involve the establishment of regional and, at times, sub-regional offices. Other considerations to make include deciding on how management controls and reporting shall be implemented and cost-effectiveness maintained.

3.6 Domestic, Regional and Global Markets

62. A CMO's primary concern and main focus is normally its domestic market. However, depending upon the profile and popularity of its works and members/rights holders, it may become necessary to address or consider strategies to respond to any growth of the use of the CMO's works beyond the domestic market (into regional and even international markets). This is not to say that the CMO needs to start full licensing operations or to open branches in markets beyond its domestic market. The system of reciprocal representation of rights among CMOs should ensure that the usage of the rights of the members of one CMO in a foreign territory can be represented by a CMO that is native to such territory and thus knows the user market better. There may also be regulatory and/or cultural impediments to 'setting up shop' in foreign markets. Having indicated this, it needs to be noted that growth in the digital market resulting from an increase/explosion in the availability of user channels means that there is a greater potential for a CMO's repertoire to be used in international markets. CMOs that are able (without significantly affecting payment of royalties to rights holders) to solicit the services of usage monitoring companies can more effectively follow-up on the usage of their members' works in foreign territories. Some CMOs support/undertake steps to promote the usage of the works of its members in foreign markets and/or to monitor such usages, thus ensuring that their members' works are used or usage monitored in the foreign markets. A CMO may, for example, participate or support participation in cultural shows (e.g. music shows and film festivals) in foreign markets which showcase the works of its members as a way of developing interests in such works. Where foreign markets, in which a CMO's repertoire is active, have no local CMO or the CMO is ineffective, there are a number of possibilities facing the management of a society. In any event, the CMO's fiduciary responsibilities dictate that cost-effective measures should be explored to ensure appropriate protection and administration of its members'/rights holders' works and rights world-wide.

3.7 Licensing Team Strategies and Policy

63. It is often said a failure to plan is a plan to fail. This is a simple but very real fact. The CMO needs to develop a sales/licensing plan in line with its strategic plan, which must be approved by its board and/or management/ executive committee. The plan must describe the planning and monitoring of sales/licensing activities and incorporate broad sales team objectives and targets. The plan must clearly indicate the person responsible for the overall sales/licensing function, as well as those responsible for specifically chosen sales/licensing channels. In this regard, there must be an allocation of broad market and sector/area responsibilities, which can be done on the basis of different rights or different usages. There must also be a setting and communication of sales objectives/targets in respect of each sales or licensing channel. See the following simple table as an example of a works/ rights/channel deliverables matrix:

SALES-LICENSING CHANNEL
DELIVERABLES MATRIX

Works (musical, audio-visual, sound recordings):

Channel	Broadcast		Public Performance		Communication to Public		Reproduction/ 'Mechanicals'			
	Radio	TV	Major	Minor	Telecom	ISPs/ DSPs	Broad-Cast	Phono	Private Copy	New Media
Sales Force –General										
Sales Force – Key Account										
Tele-marketing										
Direct Mail										
Phone-in Centers										
Walk-in Centers										
E-Commerce – Website										
Indep – Agents										
Outsourcing										
Other										

64. Responsibilities and areas of accountability need to be clearly allocated and indicated based on channels of sales/licensing and both general and key accounts. It is also important to establish a strict management and performance reporting system (see also Unit 4 on Management reporting) for the sales/licensing function, which is able to clearly measure sales results. This can be achieved by (i) identifying key data to be included in reports, (ii) consultations between the sales/licensing, finance and it departments or



functions and (iii) the review of existing (or creation of new) reports. Timely and appropriate reports must be extracted from sales/licensing databases based on the specific CMO's requirements and mandate/s but should include:

- a. Rights & works,
 - b. Major income streams,
 - c. Channels,
 - d. Economic centers,
 - e. Various user categories,
 - f. Geographic regions/provinces,
 - g. Other established/identified market criteria.
65. The sales/licensing plan should also include regular meetings of the sales/licensing staff, such as those focusing on regional issues, national issues and divisional (or channel-based) issues. Furthermore, sales/licensing results need to be carefully evaluated and responded to. The sales/licensing team needs to be able to understand and interpret reports and statistical outcomes and to implement relevant action in this regard. Such action may involve (i) possible improvements, (ii) changes in methodology or channel-specific delivery, (iii) changes to the sales/licensing plan or (iv) changes to the overall sales/licensing strategy. Certain sales/licensing team staff should have specific 'proximity' to the user market/s and any possible changes therein. This important element of 'market intelligence' should not be ignored by management and it behooves a CMO to ensure that it has in place reporting systems and policies which are such that any significant trends (including non-financial; qualitative and technological trends) or developments in the user market are reported on.

3.8 Staffing of the Licensing Function

66. The recruitment and selection of appropriately trained and skilled staff is an important aspect of the CMO's operations. In the sales/licensing area, this must be based on the choice or identification of various channels or delivery modes, where each channel must be appropriately staffed in line with the responsibilities allocated to such channel. Some of the profiles and characteristics of good sales/licensing staff include the following:
- a. Drive,
 - b. Conscientiousness,
 - c. Modesty and empathy,
 - d. Curiosity (an inquisitive or 'nosey' disposition),
 - e. Confidence and
 - f. Discipline.

67. Staff induction, coaching and retention programs as well as regular reviews and one-on-one feedback sessions (within channel structures), should, if not in place, be implemented. Sales/licensing staff should also be constantly motivated through the use of (i) clear communication, (ii) equitable treatment of all team members, (iii) regular feedback, (iv) public recognition and (v) the use of symbols of recognition (e.g. the giving of trophies, medals etc. to ‘star performers’). It is also important to ensure the existence of a fair remuneration and reward scheme for sales/licensing staff (of course in line with a progressive CMO remuneration and reward system throughout the society). Traditionally, staff (including sales/licensing staff) were rewarded on a fixed remuneration basis. There is, however, justification in creating other incentives (such as commissions, bonuses, prizes etc.) for sales/licensing staff, since they play a pivotal role in helping the CMO to achieve its core mandate of timeously paying members the royalties due to them. It is thus clear that the successful staffing of the CMO’s sales/licensing function has a direct impact on the welfare of rights holders.

3.9 Training and Equipping of Sales/Licensing Officials

68. The licensing of users in respect of copyright works is not unlike the sale of a commodity or a service. Best commercial practices are therefore important as they ensure that sales/licensing staff are well equipped and that they are regularly updated about licensing information. The extent to which sales/licensing staff need to be equipped and trained varies depending upon the nature of collective management in a country (i.e. where it is voluntary or compulsory); the general awareness by the user community of their obligations to procure a CMO’s license; the level of compliance by the public with local laws and regulations and other environmental factors. There is, however, a need for ongoing equipping and training of sales/licensing staff. This means that apart from the initial induction program, ongoing skills development programs need to be implemented or introduced (where these do not exist). Relevant training material and manuals on licensing and sales techniques need to be developed to equip staff to deliver the outcomes required in carrying out their duties. This can include the use of scenarios that the sales/licensing staff are likely to encounter when approaching users and an indication of how they can deal with such situations.¹⁹⁹ The staff should also be ‘armed’ with CMO information brochures dealing with facts about the CMO, statistics, history etc., which the staff can give to prospective users. The training of staff should also include basic training on copyright law, and relevant sections of the copyright law and regulations, as

¹⁹⁹ For example, the manual can deal with how to approach hostile users, and also contain answers to questions frequently asked by users (FAQs).



well as extracts from leading and/or appropriate cases (case law precedents) should be included in the training manual as a quick source of reference for staff whenever needed.

69. A typical sales/licensing tools package would thus include: (i) standard presentations²⁰⁰, (ii) complex presentations, (iii) common objections from users and corresponding answers, (iv) standard negotiation skills and techniques and (v) the CMO's licensing policies with reference to licensing conditions, credit terms and related matters. A glossary of standard CMO terminology would also be useful. In view of the 'representative' nature of licensing staff in particular, it is expected that the training program for the CMO's general staff would also cover 'personal tools' such as deportment, conduct, dress, time management and other behavioral issues, some of which are found in a customer service charter which all CMO staff undertake to abide by when employed by a CMO.

SCHEDULE OF SIGNIFICANT TOOLS IN UNIT 3

CMO Value of Rights – Board Views and Practice Notes

Internal Tariff Hierarchy (single and plural works and rights) Model

Best practice Evaluation Template – Tarification and Licensing Schemes

Schedule of CMO's Tariffs

CMO Licensing Schemes – Standard Terms and Conditions

Sales/Licensing Channel Deliverables Matrix

National Sales/Licensing Plan

Sales/Licensing Management Reports (depending upon market)

Sales/Licensing Staff Resources (induction program and tools package)

LIST OF REFERENCES

Ficsor M *Collective Management of Copyright and Related Rights* (WIPO Geneva 2002)

Gervais D (ed.) *Collective Management of Copyright and Related Rights* (Wolters Kluwer The Netherlands 2010)

Petri G *The Composer's Right a History of the Value of Music* (Atlantis Stockholm 2002)

²⁰⁰ For example, where the presentation relates to a single work it would be said to be standard, but it relates to multiple works it would be complex.

UNIT 4

FINANCE AND LEGAL MATTERS FOR CMOS

A. FINANCE AND ADMINISTRATION MATTERS:

4.1 Introduction

1. The treatment of finance and administration matters in this unit is not intended to be an exhaustive presentation on what is an important subject for CMOs but rather a discourse on the few key practical areas detailed below which may be of use to CMOs in addressing important financial and administrative matters within the society.

4.2 CMO Accounting and Finance for Non-financial Managers

2. There are a number of branches of accounting which serve different purposes. Two branches/areas of accounting and reporting will be addressed in this presentation, namely financial and management accounting and reporting. Both have an important place in addressing matters relating to the recording and measurement of the financial data relating to a CMO's activities. The distinction between the two disciplines and some of the basic differences between financial accounting and reporting, on the one hand, and management accounting and reporting on the other, follow.

4.3 Financial Accounting and Reporting

3. Financial accounting and reports are prepared and presented largely for the external stakeholders of the CMO on a historic basis with the focus on statutory or legal obligations. The financial accounting of a CMO usually conforms to certain national and international accounting standards (either the Generally Accepted Accounting Principles – GAAP – or International Financial Reporting Standards – IFRS). Typical financial reports produced are a *statement of financial position (balance sheet)*, a *statement of comprehensive income (income and expenditure account)*, a *cash flow statement* and a *statement of changes in members'/rights' holders' funds or reserves*. Financial reports created from financial accounting are retrospective for a past financial period, most often a year or possibly six months. The audiences for financial reports tend to be the CMO's members/rights holders, its board of directors, the regulator or oversight office, government departments, bankers and other secondary stakeholders.



4.4 Management Accounting and Reporting

4. Management accounting and reports on the other hand are largely intended for people working within the CMO. There is generally no statutory or legal requirement for a CMO to produce any management accounting reports.²⁰¹ These accounts and reports are not necessarily based only on past performance but also on current and forecasted trends and are largely used by a CMO's management to control and plan its operations and to assist with present and future decision making. Management accounting tends to involve not only quantitative but often also qualitative aspects.²⁰² The reports often focus only on certain selected areas of the CMO as decided upon by management. The time period covered by such reports is not fixed and may vary from regular weekly to monthly or bi-monthly reports.

4.4.1 Modern Trends

5. There is a growing tendency amongst CMOs to not only use historic financial accounting in the measurement, management and administration of a CMO's members' or rights holders' interests but also to introduce principles of management accounting and reporting to assist in running of its core functions. As has been mentioned throughout this tool kit, a CMO's core functions are regarded as the documentation of information about members/ rights holders and their works, the licensing of the mandated rights, the collection of fees due and the subsequent distribution of net income available.
6. To maximize benefits to a CMO, it is important for all managers within a CMO, irrespective of function or responsibility, to have a basic working understanding of the role of financial and management reporting and their place and value in decision making. We will now consider the two branches of accounting and reporting in some detail.

4.5 CMO Financial Management

7. Many CMOs address their obligations to manage the financial aspects of their operations by establishing a formal financial management policy – a policy in fact derived from the mission of the society. This policy normally covers the overall planning, directing and controlling of all the monetary and

²⁰¹ Except perhaps within the domain of good corporate governance, where management accounts and reports would be required to demonstrate management and the board's vigilance and discharge of their fiduciary duties.

²⁰² For example: Use can be made of the CMO's past actual Cost to Income ratios to forecast a future cost-to-income ratio or, a review of the CMO's immediate past actual License fees collected can be used to forecast the forthcoming year's collections etc.

other assets of the CMO, taking into account the CMO's fiduciary nature and the best interests of the members/rights holders. Individual financial management policies would vary from CMO to CMO but some of the more important financial management issues which should be addressed by any CMO are dealt with below:

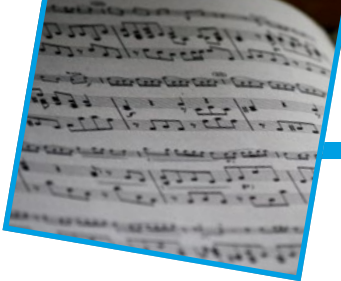
4.5.1 Understanding the CMO's Financial Reports and Results

8. Macro projections and the planning of a CMO's finances are components of an overall financial management policy. Approved CMO strategies, as expressed in financial terms, need to be evaluated in relation to results actually delivered. For this reason, a CMO's senior management should not only address the basics of income & expenditure but also matters relating to amortization/depreciation charges on assets, deferred income and/or expenditure, unappropriated/undistributed fees/amounts, movements in funds and reserves (where such exist) and the overall management of the financial position of the CMO as reflected in the assets and liabilities of the society.
9. In many countries today, the focus in annual financial reporting is on the sustainability of the CMO as a going concern. It therefore behooves a CMO's management and board to ensure that all financial and other risks are taken into account, quantified and reflected in the annual financial statements. The consequences of a failed CMO which does not meet members'/rights holders' reasonable expectations have been seen in a number of countries with resultant losses for the members/rights holders. The understanding by a CMO of business ratios and measurement practices as applied in the interpretation of a CMO's financial reports have an important bearing on that organization's medium-term sustainability. For this reason, there is increasing pressure on the management and board of a CMO to not only report on the immediate financial results but also to be able to appreciate and report on qualitative issues around the prospects of the CMO to deliver value in the future (sustainability) as well as the impact of the CMO on society and the environment at large. This is termed integrated reporting (or *integrated sustainability reporting*).²⁰³

4.5.2 Calculating and Processing the Surplus/Distributable income

10. It is generally acknowledged that the collective management of rights is not always an exact science but rather an equitable science ensuring a fair distribution of income to the CMO's members/rights holders. Once the

²⁰³ See <http://www.theiirc.org/> on Integrated Reporting. (Accessed on 22 February 2015).



financial results of a CMO's activities for a specific financial period have been established, the question of appropriation of distributable income arises. When doing this, cognizance must be taken of the CMO's overall mission, its distribution rules, policies and practices. Many CMOs' distribution rules are written in wide and general terms delegating authority to the board to amplify these taking into consideration the practical administration of the rights. In this regard, many CMOs have policies, practices and methods which supplement their rules relating to the distribution of income. The 'pooling' of certain like income streams together is a common practice arising out of decades of experience in collective management by CMOs and their federations across the world in the field of performing rights administration. In the same manner, the use of verifiable statistical analysis in making assumptions, Sampling methods, analogy, and a concept which has been cited as 'follow the dollar',²⁰⁴ balanced with cost effectiveness/efficiency and equity are also common practices. Part of the financial management function is to document and codify these policies, practices and other methods associated with the final computation and appropriation of a CMO's distributable income and to ensure that they are in accordance with the CMO's distribution rules.

4.5.3 Time Value of Money

11. The basic concept is that the value of money varies over time or that the value of a single currency unit to be received at some future time may be worth less than that same currency unit is worth today. Subjects such as present value, future value and rates of interest are part of this topic. It is important for a CMO to appreciate and understand the effect of the time value of money on its operations generally and more specifically on –

Income generation – The influence of inflation/deflation on the CMO's income can be marked in periods of rapid price increases or decreases. In this regard, many CMOs around the world include adjustments (often annually but in some cases more frequently) to their fixed price tariffs so as to respond to the loss of value in their fees over time. Many of these CMOs make such an adjustment by reference to movements in their respective countries' cost of living/consumer price indices. A common CMO best practice is to periodically make adjustments to their tariffs by reference to an independent and representative published national index such as a consumer price Index.

²⁰⁴ Also termed 'materiality', meaning the size or significance of certain income streams may also lead these income streams to be grouped together in arriving at a CMO's surplus for distribution.

Expenditure – CMO expenditure budgets need to take cognizance of the same principles. In some countries, it is the practice of service providers to include in their contracts an adjustment regulator, usually once per annum (although where inflation is high the adjustment may be more frequent). In some dispensations, one of the largest items of a CMO's expenditure budget is human resources. The salaries or wages bill of a CMO may be generally under strain, in the light of any increases/decreases in consumer prices and/or inflation generally, adjustments in salaries and/or wages of staff may be required. If the time value of money is not factored into a CMO's expenses budget, its operations may become impaired.

4.5.4 Foreign Exchange Rates

12. Both the CMO's income and expenditure may be affected by fluctuations in foreign exchange rates, where significant income or expenditure is linked with licensing of rights by affiliated CMOs in other countries or the provision/obtaining of services/goods from these countries. Foreign royalties receivable may be affected by a drop or increase in rates of exchange between the CMO's country and that of the music-'importing' countries which use its repertoire. In the same manner, where certain of the CMO's expenses are related to 'services/goods' provided from countries with a different currency of exchange, this may also affect the expenditures of the CMO (either positively or negatively).

4.5.5 Taxation Matters

13. From the writers' own experiences, the issue of taxation is an important matter which all CMOs need to address – and which some CMOs seem to have struggled with. Taxation obligations and the special legal nature and status of CMOs (which in many countries are often monopolies) have led to complexity around the relationship with local tax authorities. Formal national tax directives [formal and conclusive] dealing with CMOs and their taxation seem to be few, and what is more prevalent is the issuing of taxation practice notes [subject to change] by national tax offices. Some of the more common tax matters which a CMO needs to deal with include:

Pay as you earn tax (PAYE) (or an equivalent thereof) – the tax on CMO staff earnings. This is a common tax in many jurisdictions and the CMO has to contend with having to conform to the obligation to deduct, pay over and report on the tax on a regular basis.

Value added tax (VAT) – In many jurisdictions, VAT is levied on license fees invoiced/billed and collected as well as the distribution to members/rights



holders of royalties. Generally around the world there has been a move from general sales taxes (GST) to VAT levied on goods and services. Most national tax authorities regard the license fees billed to users of rights as a ratable service on which VAT must be charged, collected and paid over to the authorities. The VAT element on operating expenses is regarded as a 'recoverable input' against VAT payable. The quantification of VAT liabilities, completion of statutory returns and the paying over of net amounts collected and due to tax authorities needs to be attended to regularly. The problem often confronted by CMOs in this regard is the fact that it is not always well understood by members/rights holders that a CMO's distribution of royalties is regarded as 'inclusive' of VAT. This would be the case where the member/rights holder concerned is an individual and end-user and not a registered VAT vendor. Those members/rights holders who are registered for VAT with tax authorities may approach the CMO for a formal tax invoice in respect of their distributions received.

Withholding Taxes (royalty tax) – the treatment of withholding taxes applicable to Distributions made by CMOs vary from country to country. The administration thereof is generally split into two sections, namely (i) distributions to members of the CMO and (ii) distributions to affiliated CMOs in foreign countries.

a. Distributions to Members of the CMO

In regard to distributions to members of the CMO, in some countries royalty taxes are the responsibility of the CMO and these need to be deducted from members'/rights holders' earnings and paid over to the authorities; in other countries the tax obligations lie with the individual members/rights holders of the CMO to disclose their income from a CMO to tax authorities. In both cases, the CMO frequently has the legal obligation to disclose to the tax authorities details of members/rights holders, amounts distributed and other personal information.

b. Distributions to Affiliated CMOs

With regard to distributions to affiliated CMOs, often the obligation lies with the CMO to deduct a withholding tax from the distributions made to its affiliated CMOs. In such cases, reference should be made to any double taxation agreements between the tax authorities in the royalty distributing and royalty receiving countries. These agreements usually stipulate the applicable rates of taxation to be deducted (if any).

Corporate/companies tax – Generally non-profit entities are often exempted from paying tax. This is, however, not an automatic position for CMOs, which

would often have to apply for a directive regarding their tax status, specifically for any exemption. The authorities may treat the CMO as an entity that does not qualify for tax exemption. In some dispensations, where the CMO has the legal nature of a company, foundation, non-profit organization, trust or similar institution there may be a tax practice to charge tax on any undistributed sums transferred to reserves or with respect to the retained income of the CMO.

In line with being a good corporate citizen, each CMO is encouraged to engage their domestic tax authorities on all the above and any other tax matters about which they do not have clarity and to ensure that they are tax-compliant.

4.5.6 Decisions on Major Projects and Capital Expenditure

14. It was mentioned earlier in this tool kit that CMOs are human resource- and systems-intensive operations. For this reason, apart from the investment in human capital, it becomes important for the CMO to ensure that its management information and IT systems and processes (of whatever type) operate at optimum levels. The financial implications of spending CMO members'/rights holders' funds on major projects or capital-intensive assets must be capable of being substantiated on the basis of objective facts and sound financial reason. The 'motivation' for a particular project, asset or system needs to be assessed on the basis of cost, benefit, lost opportunity to use the funds in respect of another project/asset, the effect on the overall financial wellbeing of the CMO and any prospective increased future cost for the same project/asset/system.
15. Depending on the scale and nature of the project or asset to be invested in or acquired, there are various accepted methods for addressing the financial implications of project and capital expenditure. In the end, the project to be undertaken or the asset/s to be acquired have to be assessed on the basis of financial viability and implications on the current and future cash flows of the CMO (including funds set aside through any amortization charge). One of the alternatives a CMO may take into consideration is whether to interact with other existing CMOs so as to ascertain what systems can be rented, licensed or purchased from such CMOs. For this reason, it is important that the financial management policy of the CMO addresses the manner in which major projects or assets are invested in or acquired.

4.5.7 Managing 'Liquidity' of the CMO

16. In an ordinary business, it is accepted practice to manage the *working capital* of the undertaking. With CMOs, this relates to the careful management



of the short-term assets (largely accounts receivable, funds on deposit or call and similar assets) and short-term liabilities (royalties and accounts payable, current portion of leases/hire purchase of assets and similar creditor accounts).

17. The CMO would normally have a stated *General Credit Policy* relating to Accounts Payable by users of music (sometimes this may be reflected in the terms and conditions under which a music license is issued by the CMO). In any event with multitudes of users, it is common for a CMO to have many debtors. For this reason, it becomes important for CMOs to have a formal debtors system which provides regular and current information on the profile of amounts due to the CMO by users. The treatment of this debt by the CMO, its 'ageing', what to do with bad debts (i.e. write offs and recovery of bad debts) and the question of litigation on amounts due to the society need to be taken into consideration.

4.5.8 Investment of Short-Term Funds

18. Since it is in the nature of CMO operations to have a surplus of some funds, it is important to have a policy which deals with the management of these temporary surpluses. In most cases, due to the time value of money (see above), CMO boards have introduced policies which authorize management to invest these temporary surplus funds for limited periods at 'approved' institutions, normally highly rated banks/financial institutions, subject to capital and rates of return being guaranteed and secured.

4.5.9 Investment of Long-Term Funds and Reserves

19. As has been mentioned elsewhere in this tool kit, it may happen that a CMO will create a reserve fund for specific purposes where some funds will be placed until the time arrives for them to be utilized. Typically, this time period may be longer than that between collection of license fees and distribution of the same. The CMO's financial management policy should address the question of prudence in the treatment of these funds whilst lying 'idle', until required. For example, the board of a CMO may resolve to utilize some of these funds or reserves to address certain anticipated exceptional expense items. Any decision in this regard needs to conform to the CMO's reserve policy.
20. The management of *accounts payable* is also an important matter which has a significant influence on the management of cash flow within the society. CMOs should have a formal procurement policy which sets out the norms and standards relating to the tendering for or purchase of goods and services

during the course of the CMO's business and the levels of authority and amounts/values up to which a CMO manager may authorize/purchase such goods/services which falls within the manager's budget. The formal system of *accounts payable* in operation would reflect the duly authorized suppliers of goods and services, their standard conditions of payment and credit terms etc.

21. Some CMOs operate with assets or systems which are leased or are the subject of a hire-purchase agreement. These are often treated separately in the books of a CMO as longer-term liabilities but the current portion of the instalments should nevertheless appear on the monthly (or bi-monthly, weekly etc.) *accounts payable* control schedule of the finance department.
22. Lastly, there are certain 'legal/statutory' obligations/liabilities associated with tax deductions, social/medical contributions, unemployment charges and pension or other savings contributions related to a CMO's human resources remuneration. These are also liabilities featuring as specific accounts payable by the CMO, due to the respective creditor institutions by a specified date and having an impact upon the society's cash flow.
23. The prudent management of a CMO's short-term assets and liabilities will be welcomed by the membership/rights holder community as well as the regulator and should provide further financial benefit to the CMO.

4.5.10 Financial Budgeting and Variance Reporting

24. The discipline of financial budgeting is commonplace in CMOs and used as a tool of management and control. The board-approved strategic/long-term plan/s provide the CMO management with high level financial estimates. From this plan, management creates (usually) annual budgets (both operating and capital expenditure) which it submits to the board for approval and on which it provides regular financial reports about the resultant outcomes and variances. The creation of the annual CMO budget is normally a timely and collaborative matter coordinated and produced by the finance department, with managers providing various inputs – especially their forecasted income, expenditure and capital expenditure requirements. This budget is normally prepared well in advance of the forthcoming year so as to give the board of directors sufficient time to consider and approve the final version before commencement of the new year. To address the matter of available data whilst undertaking the budgeting exercise as well as timing matters, some CMOs choose to work on a reforecast or rolling budget often with a time horizon of up to 18 months.
25. The CMO board has oversight responsibility for the external financial reporting and related activities of a CMO. Some CMOs produce financial



results **internally** more frequently than once per annum, as is required by statute or regulation in many countries. Typically some CMOs produce unaudited financial accounts and reports once a quarter for the board to review against approved budgets. To obtain assurance of fiduciary conduct, many CMOs have systems of internal control and risk management which are there to provide further qualitative information on budgeting and variances to the budgets. A CMO board/management may also require periodic internal audits and evaluations of the CMO's control systems. To provide this assurance, some CMOs have a dedicated in-house internal audit function while other CMOs choose to outsource this function.

26. The impact and consequences of not taking into account some of the listed subjects/items above can be significant. The eventual effect, whether positive or negative, will be found in the net amount available for distribution to members/rights holders being either over-stated or under-stated and also reflected in the annual statement of financial position (balance sheet) of the CMO.

4.6 Management Report Writing for CMOs

27. The purpose of management accounting and reports has been mentioned above. These reports assist and guide a CMO's management in the discharge of their fiduciary duties to members and rights holders by providing important financial, quantitative and qualitative information relating to the 'day to day' operations of the CMO. This enables management to 'respond' to developments in the CMO's business environment rather than waiting for the production of annual financial statements. Management reports on a CMO's activities are traditionally considered within the themes of *Scope*, *Frequency*, *Period* and *Content*.
28. The **Scope** and nature of management reporting varies between CMOs and is dependent on the nature of the bundle of rights which a CMO administers; the user market profile and the extent of centralization or decentralization of the CMO's activities. As was alluded to earlier in this tool kit, the income and expenditure of a CMO can be broken down into various divisions, sections and segments of the CMO's business, in addition to a further analysis and reporting on the appropriation of the distributable income. Other core subjects which are frequently reported on internally by CMOs relate to user market statistics, membership, documentation and distribution activities.
29. The **Frequency** of the production of management reports varies depending on the subject-matter being monitored or measured. Some CMOs monitor and report on their income and expenditure and the divisional, branch or

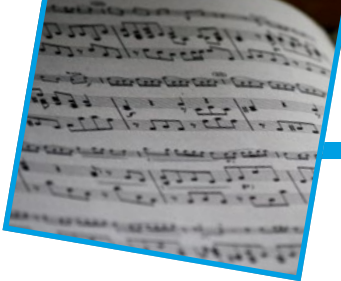
segmental activities on a daily basis, while others do so on a weekly or bi-weekly basis; however, all CMOs should produce management reports on their income and expenditure on at least a monthly basis. Reports relating to movements in CMO membership, rights holder affiliation and international representation/affiliation agreements may be produced less frequently but on at least a monthly basis. Similarly, reports on works declarations and the documentation thereof are often produced on at least a monthly basis. Reports on distribution activities are frequently divided into pre- and post-distribution reporting with the frequency of production often correlating to the frequency of distributions as provided for in the CMO's distribution rules.

30. **Periods** of measurement covered in the management reports traditionally deal with information in a current period, the immediate previous reporting period, the current financial year to date period and the same reporting period for the previous year.
31. **Content** of the management reports usually revolve around the CMO's core business processes.

4.6.1 Licensing Income

32. It will be recalled that a CMO's licensing income is dependent on the bundle of rights administered. In the case of musical works CMOs, this would extend to reporting on the **Broadcast** of musical works often broken down into the broad categories of radio, television, cable and satellite services with possible further segmentation into public, commercial/private and community services.²⁰⁵ Dedicated mechanical rights CMOs would use the same segmentation split for reproductions by broadcasters. In the case of audio-visual CMOs, **Broadcast** reporting would relate to audio-visual works, normally broken down into television, cable and satellite television services possibly also segmented into public, commercial/private and community services.
33. In the case of the **Public Performance** income stream for musical works CMOs, management reports are frequently broken down into the major sources of income (depending upon each CMO's market conditions). Typically, public performance income is measured by the contribution of the various sectors of users such as the accommodation industry (hotels, motels, lodges etc.); hospitality business (restaurants, night clubs, dance halls, karaoke bars, bars, fast food outlets etc.); the large retail sector (warehouse stores, hypermarkets, supermarkets, and similar stores) and departmental

²⁰⁵ Some national legislations may exempt certain or all community services from the need to procure a license.



and specialty stores (including both soft and hard goods as well as clothing apparel etc.); the transportation or conveyance sector (public service vehicles, motor coaches, busses, trains, ferries, boats and airplanes etc.) and other major public performance user groups, as determined by each CMO's business. In the case of audio-visual CMOs, the management reports would include the use of audio-visual works in cinemas and similar establishments exhibiting these works.

34. With the prevalence of rapid Internet applications and business models, the **communication to the public** sector involving 'online and new media' exploitations is a special focus of CMOs. Reporting should include uses by ISP/DSP companies, telecommunications operators, various hybrid services such as audio or video streaming with download possibilities, DVB-H²⁰⁶ and other mobile services. Income (dependent upon the extent of legislative protection) is also reported in categories such as webcasting and other streaming services and if licensed to do so digital downloads and ring-/ring-back tones (audio – in the case of musical works CMOs only) etc.
35. **Reproduction/Private Copy or Blank Media** levy systems – dedicated mechanical rights CMOs would also report on other income such as phono-mechanical, synchronization (where applicable), digital downloads etc. In some jurisdictions where private copy or blank media levy systems exist, rights holders have mandated CMOs to collect and distribute on their behalf the shares of this income for authors, publishers, directors, scriptwriters, producers and other members of their CMOs. Typical income categories are CD-R and DVD, audio/video players, external HDs, set-top boxes, smart phones, HD and other recorders etc. The specific categories will vary between countries depending upon the scope of legislation/regulation.
36. **International Income** – the usage of a CMO's repertoire in foreign countries/regions is of significant interest to its members and rights holders. Similar categories are followed as with domestic license income with the added feature of type of uses and source by country/region.

4.6.2 Expenditure

37. Reports on **Operating Expenditures** are frequently monitored in general categories, usually associated with the specific organizational/structural profile of a CMO. The expense categories frequently seen in some CMOs are licensing expenses, distribution expenses, member services expenses, IT costs, administration and finance costs. In other CMOs, management reports follow a functional line and categories such as human resources

²⁰⁶ Digital video broadcasting handheld – a form of mobile broadcast to mobile phones

costs, accommodation expenses, technology expenses, legal and professional services, marketing, international and other costs. In addition to the categories above, many CMOs report on expenditure related to the various regional and or branch offices they operate from.

38. Management reports on **Membership/Rights holder** representation may cover such matters as new domestic elections/additions to the CMO's membership; transfers from the CMO to other CMOs; deaths of members/ rights holders; disposal, closure, dissolutions or liquidation of corporate publisher or producer members/rights holders; disposal of individual catalogues and signing of new international representation agreements with CMOs or rights holders. Other subjects covered would include various activities undertaken in respect of member recruitment initiatives, information workshops and similar member outreaches.
39. Reports dealing with management oversight of **Works Documentation**²⁰⁷ normally cover such matters as the number of works on the documentation data base; additions of new works declared by members/rights holders; works where the copyright has expired; data relating to the actual (or proportion of the) database of works which are active and those which are inactive; disputed works – as to authorship or a division of fees between rights holders; the extent of unidentified works or unidentified rights holders; the proportion of works which are undocumented as compared to the total number of works on the CMO database and possibly information relating to overall domestic works and foreign works.
40. As mentioned above, **Distribution** management reports may be separated into pre- and post- distribution activities: (i) qualitative *pre-distribution reports* cover a number of areas. With regard to the activity monitoring of significant or important users and the processing of their licensed activities, it is customary for CMOs to have a report which provides management with information on the progress of processing such activity/usage. Typically such reports would cover the names of major licensed users, whether the users' data are the subject of a census or sampling practices in terms of the CMOs' internal distribution policies, the actual usage data received, the integrity of the data received, the progress being made internally with the processing or research associated with the data, resolution of any queries arising out of the data and the degree of progress with these processes towards final inclusion of the data in the distribution. The report may also cover the extent/ degree to which rights holders/owners of works about to participate in a distribution have been identified and if so, whether the full documentation

²⁰⁷ The term 'works' here means either musical or audio-visual works.



(share splits between rights holders) of the said participating works is available; and (ii) *post-distribution reports* include works and shares identified as un-distributable at the time of distribution and the management of queries arising after the distribution has been made. The quantitative aspects of the distribution would provide information relating to the actual categories and amounts of collections included for the named distribution, the value of distributable amounts broken down into members/rights holders and affiliated CMOs or other foreign rights holders. The un-distributable amounts may be separated further into sub-categories depending upon the CMO's member/rights holder requirements.

41. **Other Management reports** may cover subjects such as *legal & litigation* (number of court cases being handled – contractual debt or infringement of rights; lobbying on matters of legislation or regulation, corporate legal matters, etc.); *ICT activities* (relating to computerization, networking, automated systems, telecommunications and similar); *public affairs & marketing* (matters relating to the external image of the CMO, communication and information sessions with government departments, representative associations of users of rights etc.).
42. Where various functions/departments/operations of a CMO are decentralized, many of the above reports may be produced on a regional or branch basis with consolidations taking place at the CMO's head office so as to obtain a macro or national view of all its licensing, membership, documentation, distribution and related operations.
43. Many CMOs' internal operations are structured in such a manner that the leadership team meets regularly (at least once per month) with line, function and regional managers to receive, consider and respond to actual results and information presented. Any revision of plans, actions or tactics deemed necessary are dealt with so as to be able to respond quickly to such matters as the management reports highlight as requiring attention. Good CMOs ensure that their management reporting is organized in such a manner as to synergize with and enhance the operations of the CMO.

4.7 External and Annual Reporting

44. There has been debate in professional circles including amongst external auditors about the future direction of annual financial reporting. There appears to be a sense amongst stakeholders that financial reporting based on IFRS is 'becoming less fit for purpose'.²⁰⁸ For CMOs, this is an even

²⁰⁸ See www.accountancylive.com – The future of Financial Reporting – Accountancy May 2012.

more pressing issue considering the need and importance to communicate meaningfully the society’s results and future prospects to a wide and varied audience. One observation from the international auditing profession is to deal in future with corporate reporting content in three parts or sections, namely the story, numbers and detail. When preparing external annual financial statements, many CMOs already adopt a similar model to this approach. Whilst the debate continues it is vitally important that CMOs see their annual financial statements and/or annual reports as an opportunity to communicate to their constituencies. Currently, depending upon the legal nature and type of CMO (i.e. whether private, public or government department), there are still a variety of approaches to the treatment and contents of annual financial statements/reports of CMOs.

45.
- In recent years, many CMOs have moved towards annual financial statements/reports which address the so-called triple bottom-line issues, namely ‘people, profit and planet’ or to be more technical the social, financial and environmental impact of a CMO’s operations. Today, a good **CMO’s annual financial statements/report** will contain a number of elements depending upon local considerations.

EXAMPLE OF AUDITED ANNUAL REPORT CONTENTS

- The Nature and Scope of the CMO’s Mandate
- The CMO’s Broad Strategy in Executing its Mandate
- Highlights of the Year Under Review
- A Report by the Board Chairman
- Reports by the Chief Executive and Chief Financial Officer
- Reports on Governance of the CMO, including:

Profiles of Board members, Board composition, responsibilities, committees, attendance at meetings, education and remuneration, Treatment of Risk and Sustainability, Human Resources/ Capital, Code of Ethics or Board Charter, Corporate Social Responsibility (where applicable), and environmental impact
- Statement on Responsibilities of Directors
- A Formal Directors’ Report
- Main Financial Reports including:

Report of the Independent Auditors (where applicable), Statement of Financial Position (Balance Sheet), Statement of Comprehensive Income (Income and Expenditure Statement), Statement of Changes in Funds and Reserves or Equity, Cash Flow Statement and Notes to the Financial Statements

46.
- The publication of the audited annual financial statements and report should be timely and generally available within a few months after the financial year-end. To achieve this, the CMO has to work in consultation with the external



auditors for the conduct of any interim and final audits. Depending upon the legal persona of the CMO, it is customary to communicate the audited annual financial statements/report to members/rights holders. In many dispensations, CMOs are required by law to present their audited annual financial statements to a general meeting of members/rights holders of the CMO. The general meeting of members/rights holders is then afforded an opportunity to ask questions of the CMO board relating to the year or period under review.

47. In addition to making their audited annual financial statements/report available to primary stakeholders, CMOs may have a statutory/regulatory obligation to submit the report to a regulator, the companies and/or intellectual property office, a government department (such as the Department of Trade and Industry/Justice) etc. Other stakeholders to which CMOs frequently transmit their reports are affiliated CMOs in other countries. In view of the interest that CMOs have in matters relating to culture (and cultural development), many CMOs also make their audited annual report available to the relevant national ministry responsible for culture. Generally many CMOs also make their audited annual financial statements (with any supporting reports) available on their websites. Other users of a CMO's audited annual report are bankers, suppliers of credit (short- and long-term), and other crucial suppliers of services.
48. It often happens that CMOs are required to submit financial figures or reports on a **special or ad hoc basis** for parties outside those mentioned above. This may include submitting the financial reports to parliament, government commissions, international federations to which the CMO may be affiliated (e.g. BIEM, CISAC, SAA etc.), and similar external audiences.

4.8 Analysis and Interpretation of CMO Financial Reports

49. Generally the format and uses of CMO Financial Reports are twofold, namely (i) those internal unaudited financial reports for management use and (ii) the external audited annual financial reports mentioned above. Under the section dealing with management accounting and reporting, mention was made of the preparation of reports for internal use by management in their efforts to plan and control the operations of the CMO. Whether financial reports are prepared for internal or external use, the common purpose of reporting remains the need to understand and analyze a CMO's performance, as well as marketing trends, on its operations so that the CMO may be managed effectively and efficiently. Apart from the society's board and management, the CMO's members/rights holders are music business professionals dependent upon the CMO for a part of their annual earnings. As with

shareholders in an ordinary business enterprise, they have a material interest in the CMO's past and current financial performance as well as its future prospects. It is important therefore for a CMO to ensure that it regularly reviews, analyzes and interprets its financial results.

50. **Different Analyzes** are conducted by readers of a CMO's financial reports but inevitably most quantitative measures involve comparisons of figures contained in the various reports from one accounting period or financial year to another. Some of these analyzes are to 'measure/assess' performance or trends and may include some of the following:

Composition of gross income – It is important to understand the sources of a CMO's income in order to ensure that the rights it is mandated to administer are *effectively* managed. Most CMOs would divide the reporting of income into segments related to major and minor users. It may be that a CMO is having greater success in administering certain **sectors** of rights users than others. Where a CMO is mandated to administer the rights of broadcasting and only the public broadcaster is reported as paying fees, there may be unlicensed fee income potential in respect of any existing commercial or community broadcasters. The same would apply with public performance/communication to the public or private copy (where this exists). This analysis is often extended to reporting on a geographic basis. Some sectors or regions of music users may be more difficult or incur more costs to license than others. It may be that the CMO is having significant success in its licensing endeavors in some **regions** or provinces of the country but not in others. Questions could then be addressed as to when the unlicensed regions would receive attention.

Overall cost to income ratio – The cost of doing business is important in any enterprise. One of the most common measures is the ratio of a CMO's total administration cost to its overall income. This ratio indicates the efficiency of the CMO in controlling these costs, which would result in the maximizing of its distributable income to members/rights holders. The establishment and importance of this ratio is found not only in reflecting the efficiency of the CMO in execution of its fiduciary mandate but also in highlighting any trends that may appear from one accounting period to the next. This overall ratio may be further broken down into sub-ratios correlating to spread of the society's gross income.

Domestic (net of foreign income) cost to income ratio – Where a CMO has a repertoire which is used in other countries and consequently receives foreign income, this foreign income arrives in a processed form with the major licensing and administrative costs having been deducted in the country of



origin of the income. Thus modest costs are incurred in distributing these royalties to the CMO's members/rights holders. Some CMOs remove this foreign income and associated domestic expenditure from their computation of cost to income ratio so as to establish a 'domestic cost to income' ratio. This specific ratio has some relevance when seeking to compare CMOs from different countries and their respective cost to income ratios. This domestic ratio may also be broken down into sub-ratios as mentioned above.

'Real' total income and expenditure – In times of generally sustained increases in prices of goods and services (inflation), the value of money is diminished. This phenomenon also impacts the royalties distributed by a CMO. It thus becomes important to establish whether there has been an actual increase in license income or whether the increase is only as a consequence of the fact that the CMO's tariffs may be linked to movements in a cost of living index. The same would apply to the CMO's expenditure and the growth or reduction in the total expenditure.

Net amounts available for distribution – This ratio is used to compare net amounts available for distribution from a current accounting period with that of a previous accounting period. It is common place in all businesses for stakeholders to have a regular interest in the 'bottom line' and the improvement therein from one accounting period to the next. If the CMO's statement of comprehensive income reflects a regular increase in gross income but the amounts available for distribution does not reflect similar movements, members/rights holders would have a direct interest in the reasons for such discrepancies.

Cash flow movements as compared to the movements in comprehensive income – Since CMOs tend to be organizations which may have at their disposal large sums of money for short periods of time, the society cash flow statement is a report to which readers should pay close attention. Where comprehensive income increases or decreases from one accounting period to the next, the resultant cash flow movements from operations should reflect a degree of correlation.

Movements in income as compared to accounts receivable – Any increase or decrease in a CMO's income may be mirrored by a similar increase or decrease in accounts receivable. Where movements between the two do not correlate this could reflect an improvement – or deterioration – in the time it takes to collect income from licensees and consequently the 'ageing' of the accounts receivable.

Level of undistributed income in relation to distributable income – In the management reporting section above, reference was made to reports on the

state of the works documentation data base. One of the reasons for there being undistributed income in a CMO (apart from specifically authorized amounts set aside, e.g. into the reserve fund) is the level of unidentified works or rights holders at the time of making a distribution. The detail of a CMO's undistributed income is normally found in its statement of financial position (balance sheet) under current liabilities. Increases or decreases in the amounts undistributed compared to distributable income from one accounting period to the next may reflect on a number of factors including the level of unidentified works or rights holders on the CMO's data base.

Movements in funds and reserves (where these exist) – CMOs should always be cognisant of any amounts not distributed to members/rights holders. During the normal course of business, the society may decide to set aside funds out of amounts collected for a particular purpose. These figures are normally reflected in the statement of financial position (balance sheet) of the CMO and movements reflected in the statement of changes in funds and reserves. The purpose of these funds or reserves, their value and movements therein should be regularly considered by the CMO, its Board and members/rights holders.

4.9 Administration Systems Addressing Finance/Risk Issues

4.9.1 Finance-related Issues

51. Administration systems established to address other finance-related issues may include the creation and documentation of standard principles, policies and practices manuals for the CMO's different operating functions. Such manuals would contain the financial implications for various CMO's operating functions. The responsibility for the creation, generation and maintenance of Standard management accounting and financial accounting reports normally lies within the finance function. Within the finance department itself the use of a standard Chart of Accounts should be in place and also implemented across any decentralized operations, thus ensuring timely and accurate capture of all accounting entries and their ultimate consolidation within the books of account of the CMO. The responsibility for the financial aspects of various support functions within the CMO such as legal and compliance, human resources, information technology, rental/accommodation, public affairs and/or marketing, procurement should not be omitted when looking at finance matters for CMOs. Particular attention needs to be given to outsourced services, as these may have a significant financial implication for the CMO. Thus in addition to registers of internal CMO assets, a register of



all outsourced services, the period/s covered involved in such arrangements and the financial terms relating thereto need to be kept.

4.9.2 Risk-related Issues

52. In the section above, dealing with CMO Financial Management the question of risk was mentioned. Uncertainty is part of human existence and CMOs are not an exception in this regard. Negative uncertainty is often termed risk.²⁰⁹ Normally, it is the CMO board which has overall responsibility for the *internal control* framework and the oversight of *risk identification* and *risk management*, in line with the society's strategic objectives. Boards often establish a risk and/or audit committee to assist the board in fulfilling these responsibilities. The mandate of this committee is to ensure that the CMO management establishes and implements appropriate systems and policies to *identify*, *monitor*, and *mitigate* significant risks to the CMO. These systems and policies normally include the setting of appropriate *internal controls* and *risk limits*. They should be reviewed regularly to reflect any changes in the market environment in which the CMO operates. Many CMOs comment on risk in their annual reports. The general approach of CMO management has been to create an *internal risk assessment policy/process* so that any significant risks and interrelated incidents are timeously identified, analyzed, documented, decisions made on possible action, reported on and monitored in a structured manner. The response to risk has in some CMOs (as in many other businesses) been addressed by the introduction of an internal audit function. This function may reside in-house or outsourced to an independent service provider. Risk management involves not only the existence of an internal audit function but also fraud awareness/prevention/detection programs and other quality assurance initiatives.

Example of RISK Management Process

Risk Matter → Origin of issue → Possible/Probable Consequences → Monitoring/Mitigating action

53. In view of a CMO business frequently being a 'single channel supplier' and its intensive reliance on information systems and related technology, a CMO's risk exposure to IT is often high on the list of areas of risk for some CMOs. It would be essential for CMO management to ensure that both a formal IT disaster recovery plan and appropriate backup systems are in place. As a part of addressing management's responsibility for appropriate systems and policies some CMOs have also introduced as part of their risk

²⁰⁹ See Wixley T and Everingham G Corporate Governance – A Practical Guide for Effective Implementation (SiberInk Claremont 2005) at page 84

management, a ‘crisis/disaster management’ plan.²¹⁰ The main elements of such a plan normally include (i) definition of what constitutes a crisis/disaster; (ii) the members of the crisis/disaster team (including list of external professional advisors); (iii) the clarity of each person’s role; (iv) the CMO’s general policy on dealing with crises or disaster incidents/events (including internal CMO standards and practices as well as the health and safety of people); (v) protocols for crisis communications; (vi) guidelines for the initial assessment and investigation of the crisis/disaster; (vii) business continuity issues and (viii) post-crisis/disaster management. It is suggested that where a CMO embarked upon the establishment of such a plan, some external input needs to be obtained as each CMO’s environmental circumstances may differ.

B. LEGISLATIVE/REGULATORY AND LEGAL MATTERS

4.10 Introduction

54. Copyright is essentially a creature of statute and the scope and level of protection of rights holders interests’ thus lies with national legislation, which sets out the works and rights protected and the extent of the protection afforded. In many jurisdictions, case law (i.e. judicial interpretation of law) also plays a pivotal role in this regard. Relationships in the copyright industries are generally based on contractual agreements/arrangements, and thus the law of contract is also an important area of law for CMOs. The law of contract is also particularly important with regard to the licensing agreements entered into between a CMO/rights holders and users of copyright works. The actual enforcement of rights against infringers is generally based on tort/delictual principles and at times, criminal sanctions, and the law of evidence and procedure play an important role in this regard. The rights, which are either exclusive or rights of remuneration, may be individually managed but some of the rights (such as performing rights in musical works) are best administered collectively managed through a CMO. For a more detailed commentary on rights administered by CMOs please refer to the Unit 1 section, ‘Legislative and Regulatory Environment’, generally.
55. In general, the legal department or section of a CMO would, subject to each CMO’s peculiarities, have significant responsibility or input into the following key areas: statutory and other legal compliance, litigation management, relations with external legal counsel, contract management, legal risk management, general legal advisory services, corporate governance and

²¹⁰ See Unit 5 for communications aspects around a CMO Crisis/Disaster Plan.



government relations. This part of the tool kit is not intended to address the full scope of the responsibilities of a CMO's legal department, but rather to serve as a brief treatment of some of the more important focus areas, set out in a simple structure in ensuing paragraphs. Having indicated this, the main responsibility of a CMO's Legal department/function is to align the department/function's activities and work with the overall strategy and direction of the CMO.

4.11 Legislative Improvements and Reform

4.11.1 Accession to International Treaties

56. As mentioned in Unit 1, there are a number of international treaties and conventions which governments have acceded to and ratified. Two of the more important international treaties addressing the interests of copyright owners are the Berne Convention and the WCT. As indicated, the Berne Convention was incorporated into the TRIPs Agreement of the WTO by reference. These treaties commit the signatories to certain minimum legislative arrangements in their countries. It would be important for CMOs to have a working knowledge of these two treaties and to encourage their governments to accede to these treaties. More importantly, CMOs need to determine if national legislation has fully incorporated the standards embodied in these treaties. As noted in Unit 1, rights holders may, in their lobbying efforts, appeal to arguments relating to the protection of human rights, especially the provisions of Article 15(1) (c) of the International Covenant on Economic, Social and Cultural Rights which elevates the rights of authors to the level of human rights.²¹¹

4.11.2 Relevance of National Legislation

57. As noted above, accession to international treaties is not enough if national legislation does not fully incorporate the protection provided for in the treaties. In this regard, it is important for rights owners/holders that national Copyright legislation should be a modern instrument relevant to its time. The past 20 or so years have seen rapid developments in the information, communications and technological fields (especially with respect to digitization and online media), resulting in new ways of creating and exploiting copyright works and the emergence of new business models. In view of this, national legislation needs to at least reflect the principles and

²¹¹ Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights provides that everyone has the right 'to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.'

standards provided for under the WCT to ensure better protection for rights holders. To deal with complications arising from the enforcement of copyright in the digital environment, including the question of liability for online infringement of copyright [related rights], some jurisdictions have introduced mechanisms such as take-down notices, which are issued to ISPs/DSPs by rights holders instructing the ISPs/DSPs to remove material that allegedly infringes the rights holders' copyright [related rights]. Some countries (e.g. France, UK, South Korea etc.) have introduced the so-called *graduated response* (or 'three strikes') system, in terms of which a series of notices are sent to consumers warning them of alleged copyright infringement and giving them an opportunity to stop the infringement, failing which measures such as bandwidth reduction, protocol blocking or account suspension may be implemented.

58. Measures implemented must of course ensure better protection of members/rights holders in the modern environment. It is thus clear that effective and efficient collective management on behalf of members/rights holders is in part dependent upon the extent to which a country's constitution and its national copyright laws are harmonized and reflective of the current environmental circumstances faced by rights holders. Where legislation is not up-to-date or reflective of the circumstances faced by the country's authors, publishers and producers, it would be important to persuade government to improve, revise or amend such legislation. In order to effectively lobby legislators, it would be important for rights holders to organize themselves in order to lodge a united front. This may require the CMO to solicit the support of other interested parties, such as rights holder associations and the broader body of copyright holders (even if these are not directly concerned with the rights administered by the CMO). It would also be important for members/rights holders to lend whatever support they can to their CMO in its lobbying efforts, and not to think that the CMO management and/or board has to carry this work out on their own. As indicated in Unit 1, the involvement of rights holders in the lobbying process can lend more credence to the process and is likely to assist in persuading legislators to heed the call for legislative reforms/new laws.

4.11.3 Law Reform Commissions, Advisory Boards and /or Working Groups

59. In many countries governments have set up formal structures such as *law commissions* to address the efficiency of laws, to deal with necessary developments and to propose legislative changes. These structures are often of a statutory nature but are ostensibly there to carry out independent research and make recommendations to improve a nation's laws. Other



entities/bodies specific to certain areas of law may also exist to support this activity. Some of these entities/bodies have formal state recognition and may play an 'advisory' role to government on prospective legislative reform. In this regard, national copyright legislation often provides for a *copyright advisory board* (or its equivalent), whose membership is comprised of representatives from the broader copyright and related fields, many times also including judges and prominent lawyers. The CMO needs to take advantage of such entities/bodies and to endeavor to have representation in them or at least to seek to influence discussions taking place in such entities/bodies.

60. Many CMOs have at their disposal a legal department/section which, in collaboration with rights holders and with the assistance of external counsel, may undertake research and associated work relating to the impact of proposed reforms in laws. In some dispensations, it is practice to establish a *working group* made up of CMO officials, rights holder representatives and/or representatives from rights holder associations, external legal counsel and any other directly-interested parties. Governments are sometimes loathe to consider new legislation/amendments to legislation where there is little evidence of the need to change existing laws. At the outset, it would be important for a CMO working group to be able to demonstrate to a law commission, copyright advisory board, government departments or the legislature that the CMO is a bona fide representative of the rights concerned and that it carries out its duty in a conscientious manner and in the best interest of members/rights holders. Whether the reform proposals relate to the introduction of new legislation or the correction of existing legislation which impedes upon or rather is a hindrance to the effective administration of rights, (with resultant prejudice and economic hardship to rights holders), the working group's research and proposals must provide adequate evidence and information in support of the CMO's cases. Once draft proposals are available from the CMO working group, these would be submitted to the CMO's management and board and ideally also to a wider audience of rights holders/rights holder associations, so as to ensure that the consultations are as inclusive as possible and to receive all relevant inputs on the proposed reforms. Part of the consultation and input-gathering process may be to obtain views, experiences and information from other external institutions or groups as well as examples from other countries. Such broader, additional consultation may include (i) receiving input from other domestic institutions/groups affected by the legislative reform initiative; (ii) receiving input from institutions/groups from countries within the same region or economic community; (iii) obtaining examples of good legislation from the same region or economic community; and (iv) receiving input and examples from other groups having an interest in and/or displaying support for the reform initiative.

4.11.4 Lobbying Activities and Reform Proposals

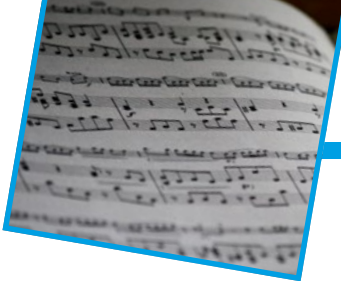
61. In many countries, the activity of lobbying²¹² is progressively being used to ensure that rights holders' interests are protected and enhanced. Lobbying is thus an important aspect of the role of the modern CMO. Having indicated this, it needs to be noted that lobbying is not an easy activity and the CMO concerned may not have the expertise to engage in lobbying activities. In this regard the following has been noted about lobbying:

Although lobbying as a whole serves as a checks-and-balances safeguard on the legislative process, individual lobbyists are not necessarily equal. Unlike voters, who each get one vote, lobbyists vary in their degree of influence. The level of influence a lobbyist has over the legislative process is often proportional to the resources – time and money – the lobbyist can spend to achieve its legislative goal.²¹³

62. In view of this, the CMO needs to think seriously about its lobbying strategy. Does the CMO have the capacity on its own, to lodge a successful lobbying strategy? The formation of the CMO working group referred to above can greatly assist the CMO on its lobbying endeavors. Joining forces with others can also enhance the CMO's chances of succeeding, rather than being a 'lone ranger' that is seen as pursuing its own, secluded interests. The CMO could also solicit support for the lobbying activity from high profile members/rights holders, particular member/rights holder associations and even user groups (where appropriate). Furthermore, if the CMO constantly conducts isolated lobbying (without being part of a broader interest group), legislators may treat its submissions as self-serving and in time develop apathy towards them. Forming a CMO working group and also working with other interested parties can assist the CMO in lodging a successful lobbying strategy. The CMO's role in lobbying must of course, itself, be approved at board level. The CMO working group should ideally prepare the reform proposals under the guidance of the CMO's Legal department /section, so as to ensure moderation or sensitivity in respect of any controversial aspects of the proposals or any possible opposition from other groups (e.g. certain user groups). Under such circumstances the legal department/section may, as part of the reform strategy, assist in formulating alternative (secondary, next-best or compromise) positions, in the event that the first option is not accepted. The lobbying strategy must clearly identify primary and secondary targets of the lobbying activities (e.g. the law commission, members of

²¹² Defined as involving 'the advocacy of an interest that is affected, actually or potentially, by the decisions of government leaders'. See in this regard <http://legal-dictionary.thefreedictionary.com/Lobbying> (Accessed on 18 March 2015).

²¹³ *Ibid.*



the copyright advisory committee, particular government departments and officials, members of the relevant parliamentary portfolio, other important members of parliament, members of political parties etc.).

63. In some jurisdictions, collective lobbying in respect of issues affecting members of a broader industry is carried out by a separate representative body that focusses on lobbying initiatives. In the UK, for example, *UK Music* (formerly British Music Rights) was formed as a representative body of various music industry entities (e.g. PPL, PRS for Music, BPI, the Musicians Union, Music Publishers Association etc.) to, *inter alia*, '[engage] in high level political lobbying to ensure any new legislation benefits its members'.²¹⁴ Where such an industry body exists, the CMO working group can augment its lobbying strategy by working with such a body, thus obtaining a stronger voice on the issues raised. It is important to note, however, that the strategy adopted by the broader industry representative may not fully represent the issues that the CMO wishes to bring to the attention of the legislator (in particular because the broader industry body often represents divergent interests). In view of this, it may be necessary for the CMO not to solely rely on the submissions made by the broader industry body but to lodge its own parallel lobbying strategy that focusses on its own unique issues. For example, both *UK Music* (of which PRS for Music is a member) and PRS for Music itself, made separate submissions in relation to the so-called Hargreaves Review in the UK.²¹⁵

4.11.5 Lobbying 'Package' and Communication

64. The CMO Working Group needs to devise a proper lobbying package involving a convincing communication strategy. As lobbying is directed at legislators (and other officials) who generally have busy schedules and often do not have the time to research the issues raised, the communication needs to be concise and to the point. It needs to clearly highlight both the legal, economic and business arguments relating to the issue raised and where appropriate, provide essential statistical information in support of the arguments raised. It has been said that a good lobbying communication strategy needs to clearly reflect *who* the communication is intended for (e.g. is it parliament, government officials, members of the law commission etc.); *when* the communication is to take place (e.g. just before general

²¹⁴ See further <http://www.ukmusic.org/about-us> (Accessed on 17 March 2015).

²¹⁵ See in this regard <http://musically.com/2011/08/03/uk-govt-to-respond-to-hargreaves-review-today-but-music-biz-gets-reaction-in-early/> (Accessed 18 March 2015).

elections); *what* message is being communicated,²¹⁶ and *how* the message is to be communicated (e.g. writing, visits and meetings, committee hearings, one-on-one meetings with politicians etc.).²¹⁷ The CMO may also solicit the assistance of external professionals, consultants and the media at large in devising its communication strategy (e.g. through the use of press statements). Nevertheless, it is important that the CMO remains actively involved in the lobbying process to ensure that the message it wishes to communicate is not diluted.

4.12 Regulatory Affairs

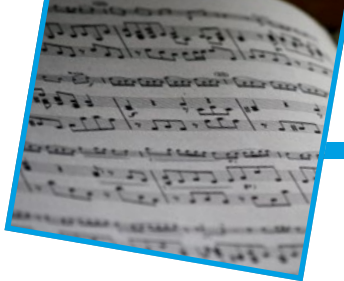
The regulatory affairs role of the CMO can be divided into the following components:

4.12.1 CMO Oversight

65. It would be important to maintain good relations with the oversight ministry responsible for ensuring compliance with the terms and conditions of the CMO's operating license (where this exists). The CMO's oversight role must also ensure that the CMO's operating license is renewed in a timely manner and that all terms and conditions relating to the renewal are strictly adhered to. The oversight role may be given to a business affairs manager, chief operating officer (COO), legal manager or company secretary. The responsible person must also ensure the timely filing or submission of any compliance reports required by the oversight ministry/regulator. It may also be important to constantly engage with the oversight ministry or regulator with regard to the interpretation and practical implementation of any regulations relating to the operations of the CMO, so as to attain a similar understanding of the regulations. The CMO could also make a case for exemption from some of the regulatory requirements until certain thresholds have been achieved (e.g. exemption from requirements relating to the level of administration costs permissible until such time as the CMO has reached 'break even' levels). The department/section responsible for regulatory affairs at the CMO must be available to provide constant advice and assistance to other CMO staff with regard to the CMO's relations with the regulator. The CMO's legal department/section should be able to provide assistance/advice with regard to matters relating to licensing scheme disputes and the referral of matters to the copyright tribunal/rate court/arbitration courts.

²¹⁶ It has been said that a clear message must contain a (i) statement of the issue, (ii) evidence, (iii) an example and (iv) an invitation to action. See in this regard <http://www.making-prsp-inclusive.org/en/8-advocacy-and-lobbying-influencing-policies/82-basic-techniques/822-convincing-and-strategic-communication.html> (Accessed on 18 March 2015).

²¹⁷ See *ibid.*



4.12.2 Compliance with Laws, Policies and Regulations

66. Regulatory affairs are not only limited to matters directly relating to the administration of copyright but extend to other areas such as compliance with various laws affecting the CMO as a corporate entity. This may include:
- (i) Requirements relating to corporate (or other organizational) law, such as the need to file annual returns, annual financial statements etc.;
 - (ii) Requirements relating to labor/employment law, including the involvement of the legal department/section in providing support to the HR department/section regarding various corporate policies and procedures, issues relating to disciplinary procedures for employees, trade union relations and recognition agreements and the like;
 - (iii) Requirements relating to tax laws – supporting finance department/section in the interpretation and application of various aspects of national taxation law (VAT, income tax, withholding taxes, PAYE etc.) as well as any regional tax matters (see the discussion on taxation above under the section on CMO financial management);
 - (iv) Requirements relating to property and lease law. The CMO may be renting property or having property of its own that it leases out. The relevant department should be able to advise CMO management on issues arising from this; and
 - (v) Requirements relating to national/federal, provincial/state or municipal/local regulations and by-laws, especially where the CMO's operations are decentralized with offices in various parts of the country.
67. The responsibility for such broader compliance issues may lie with the company secretary, compliance officer or the legal manager (or a combination of these roles or either of the roles with the support of the other). This compliance role extends to ensuring compliance with the CMO's own constitutional documents, rules, policies and procedures, and includes providing advisory support to the board on various matters relating to its governance of the CMO, rights and duties of board members, adherence to the board charter and/or code of conduct etc.

4.12.3 General Government and Relations

68. The department/section designated with dealing with regulatory affairs may also have been assigned responsibility for formal relations with government departments or agencies whose actions or decisions have an impact on the

CMO's operations and is administration of rights. These departments and agencies include the following government departments/ministries:

- (i) Department of Trade and Industry/Economic Affairs. In several jurisdictions, this is the department responsible for trade laws and policies (including intellectual property laws) and is thus in many cases the most-important department that CMOs have to relate to. In the case of regulated CMOs, this would most probably be the department that provides the supervisory role to the CMOs (either through the office of the registrar of copyright or another unit of the department designated for this purposes);
- (ii) Departments of Justice, Police, Customs and Excise. These departments are important in that they provide the necessary enforcement mechanism with regard to copyright protection. They administer the court system, the policing function, customs unit etc. and are instrumental in dealing with matters relating to the combat of piracy and the prevention of illegal importation of copyright works etc. In some jurisdictions (e.g. Germany) the Department of Justice also acts as an oversight department in respect of CMOs;
- (iii) Department of Arts and Culture. In many jurisdictions the Department of Arts and Culture acts as the national custodian of the interests of national creators and publishers, directors, script writers, filmmakers and other artists. It provides an enabling environment for the promotion and development of arts industries by providing funding, support for arts initiatives, provision of archival and research services and working with the ministry responsible for intellectual property laws to ensure that the interests of arts professionals are taken into account. In certain jurisdictions such as France the Ministry of Culture is responsible for matters relating to the administration of copyright and the approval of CMOs;
- (iv) Department of Broadcasting and/or Communications. This is an important department because it regulates matters relating to the licensing of broadcasters, cable operators, telecommunication companies, ISPs/DSPs etc. It is also often responsible for the regulation of local content quotas with respect to the usage of copyright works such as music and audio-visual works. It is important that the CMO maintains a good relationship with this department as the department may be of assistance to the CMO when the CMO experiences difficulties in its endeavors to license certain broadcasters, telecommunication companies etc. Under such circumstances the department might, for example, be persuaded to include as a condition for the renewal of a broadcast license, proof that the broadcaster, ISP/DSP etc. concerned has a valid music/audio-visual license from the CMO;



- (v) Department of Tourism. In countries where tourism is a significant contributor to GDP and employment, forging good relations with this department and supporting the department in its efforts to develop and protect the tourism industry would be important. This is because a successful tourism industry can immensely benefit rights holders whose musical works/audio-visual works are used in the accommodation and hospitality industry and other musical tourism initiatives.

4.12.4 Other Agencies of State

- 69. The CMO needs to also maintain good relations with other relevant agencies of state, including the broadcasting communications commission/regulator; the copyright board, the competitions authority, the price controller, the law commission etc.

4.13 Dispute Resolution

4.13.1 Introduction – Alternative Dispute Resolution (ADR)

- 70. Conflicts or disputes arise in relationships between individuals, groups or businesses in general. Often due to the requirement for continuing relations between disputing parties, there is a growing view around the world and within the judiciary that many of the cases that reach a country's courts may have well been settled earlier if there had been other or earlier intervention measures. Many countries now support policies or programs which require evidence of attempts at resolution of these conflicts or disputes before resorting to litigation. This is also a growing practice in a number of regions of the world (e.g. the EU ADR Directive).
- 71. This situation has particular application for CMOs which are largely non-profit organizations operating frequently as single channel suppliers of a particular service. Given the variety of conflicts or disputes which could arise whilst administering the interests of their members/rights holders, some CMOs have set up policies that address conflicts and disputes among members/rights holders. Some of these policies provide for a particular route/process of conciliation and mediation that disputing parties need to follow in an attempt to arrive at an amicable or mutually-agreeable solution that ensures that business or working relationships are maintained. Where the conflict or dispute is of such a nature that conciliation and mediation is of no assistance the introduction of arbitration to forestall any litigation (and the time, cost and procedural hassles often associated with it), is often a preferred course of action. The CMO's legal department/section is often called upon to assist with the formulation/development, facilitation and/or implementation of such policies. The legal department /section would also frequently be the custodian of many of the

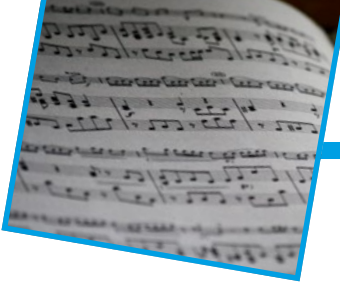
underlying policies and documents involved in such conflicts disputes. In the table below, this subject is addressed by identifying common parties to conflicts or disputes within CMOs, separating the parties into those that are regarded as internal to the CMO and those which are regarded as external.

4.13.2 Internal Dispute Resolution Mechanisms

72. The table below sets out some suggested mechanisms which should be revised and supplemented in light of the local environmental factors applicable in each CMO in relation to the governance instruments, regulations and policies used.

INTERNAL DISPUTES

PARTY IDENTIFIED	DOCUMENTS RELIED UPON	RESOLUTION THROUGH
Members of Board of Directors	CMO constitution; board charter and / or board code of conduct; board minutes (decisions); decisions of CMO AGM (Minutes) and other governance documents	Board sub or ad-hoc committee; external facilitator/mediator, e.g. from the local institute of directors; special general meeting of members
CEO, Senior Management	Service contracts/Letters of appointment; CMO business plans and performance agreement; labour/employment law; public service terms and conditions of employment (in the case of CMOs that are part of the state administration)	Performance contracts and evaluations and assessments; board finance committee
General Staff	Employment contracts, labour/employment law, union recognition agreements, performance agreements, public service terms and conditions of employment (in the case of CMOs that are part of the state administration)	Human resources department; performance evaluations and assessments; grievance procedures; conciliation/ mediation meetings; union representative meetings; disciplinary hearings
Members/ Right Holders	CMO constitution, membership/ distribution rules; member affiliation agreements; decisions of CMO AGM (minutes), board minutes (decisions); customer service charter; complaints/ claims procedure/s	Membership department; relationship management unit; CMO management; dispute resolution committee; board of directors; technical/ musicological advisory committee; member/rights holder professional associations, unions or guilds
Affiliated CMO/foreign Rights Holders	Agreements of representation; decisions of respective CMO boards; international codes of conduct for CMOs	International department; communications between CMOs; referral to respective CMO's internal legal counsels; mediation/arbitration in terms of codes of conduct for CMOs
International CMO associations	Governance documents of multilaterals, membership rules – BIEM, CIAM, CISAC, SSA, writers directors worldwide, IFPI, FIM,SCAPR etc.	Special third-party facilitated Conciliation, mediation and arbitration panels (e.g. WIPO Mediation and Arbitration Center); other international arbitration organizations



4.13.3 External Dispute Resolution Mechanisms

73. Since the nature of the relationship between a CMO and other external parties that are ‘stakeholders’ of the CMO generally varies from CMO to CMO, it is incumbent upon each CMO to identify or devise its own mechanism for dealing with conflicts and disputes that arise in its own environment. The table below should thus be amended to suit the unique circumstances and local environmental factors applicable to a particular CMO.

EXTERNAL DISPUTES

PARTY IDENTIFIED	DOCUMENTS RELIED UPON	RESOLUTION THROUGH
Users holding a valid license from CMO	CMO License/contract terms; general CMO Credit control policy; memoranda of understanding/undertaking with user trade associations; special arrangements for members of group licenses	Credit control department; negotiation meetings with license debtors; amended settlement terms/compromise agreements etc.
Users – Not holding a license from CMO	Information brochures, letters and pamphlets; CMO FAQs; national legislation	Licensing department visits and other communications; Workshops ; relations and open days for user trade associations
Oversight ministry	CMO regulations; license to operate; CMO constitution; decisions of CMO AGM (Minutes); annual report and other ad hoc information	Board/management; public affairs section; rights holder associations; invitation to visit CMO
Other government departments than oversight ministry	Board charter and/or board code of conduct; board minutes (decisions); decisions of CMO AGM (minutes); annual report and other statistical information	Legal department; public affairs section, board lobby/advocacy group; oversight ministry; invitation to visit CMO
Wider music and audio- visual business community	Information brochures; letters and pamphlets; CMO FAQs; annual report and other statistical information	Public affairs section; workshops, seminars;
Wider community at large	Information brochures, letters and pamphlets; CMO FAQs; national and regional media and communications plan	Public affairs section; advocacy groups

4.14 Litigation Management

74. As was mentioned under Dispute Resolution, there are a number of alternative dispute resolution mechanisms that can be implemented prior to instituting litigation. Since litigation is usually a lengthy and costly process and also gives rise to problems such as reputational risk (i.e. the diminishing of the reputation of, or loss of trust in the CMO because of the allegations levelled, even though the CMO may ultimately win the case), the CMO’s

legal department/section needs to take steps to mitigate the risks associated with litigation. From a management perspective, this responsibility lies with the head of the legal department/section. Some CMOs make use of insurance schemes to ameliorate or mitigate a society's potential expenses associated with litigation. Where the mechanisms to forestall litigation have all been explored and the only solution is litigation, it becomes important for the CMO's legal department/section to effectively, efficiently and vigilantly manage the litigation process. Litigation may either be *contractual* or based on the *infringement* of the CMO's (or its members'/rights holders') rights.

4.14.1 Contractual Litigation

75. Significant areas of contractual litigation where much of the legal process is based on documentation available internally to a CMO tend to include –

(i) Licensee/user associated litigation

Litigation in this case is based on default of the license terms arising from the license agreement between a licensee and the CMO (e.g. failure to pay license fees; late payment of license fees; failure to submit music usage information etc.). Seeing that a medium-sized CMO will have thousands of licensed users of music at any given time, litigation based on default of license terms cannot be undertaken with regard to every default and should only be resorted to where the mechanisms mentioned above have not yielded any results. In view of this, the CMO may have to target (i) those defaulters whose default would cause the most harm to the CMO and its operations (e.g. major users) or (ii) those defaulters that the CMO wants to target as exemplary cases to warn similar defaulters against continued default of the licensing terms (e.g. where a group of similar users elects not to pay license fees).

(ii) Member/rights holder litigation

This general relates to the membership agreements entered into between the CMO and its members/rights holders, empowering the CMO to administer rights on behalf of the members. Such litigation usually arises from disputes relating to claims of non-payment of royalties, inaccurate payment of royalties, inaccurate accounting for royalties, payment of royalties to an incorrect party, failure to adhere to the provisions of the CMO's constitutive documents etc. Litigation between the CMO and its members/rights holders should be avoided as much as possible and the CMO should attempt to resolve all disputes with members/rights holders promptly and before they assume a litigious nature. Member/rights holder-CMO litigation can have a damning



effect on the CMO's standing and reputation in the market and before regulators, even if it is later proved that the claim of the member/rights holder instituting litigation had no basis.

(iii) Litigation relating to staff disputes

Sometimes a CMO faces disgruntled staff members who may wish to institute litigation against it. As indicated earlier, a CMO's business is to a great extent dependent on its human resources and thus it is in the interest of the CMO to maintain good relations with its staff members as much as is possible and to try to resolve problems before they assume a litigious nature. The internal disciplinary process should be fair and transparent to avoid an adverse ruling against the CMO when a staff member lodges an appeal against an internal disciplinary hearing to an outside body or a labour court. Having indicated this, a CMO stands in a fiduciary position on behalf of the members it represents and must thus not tolerate any acts of fraud or corruption which may negatively affect its representation of members (e.g. where such acts relate to financial loss, theft, tampering with member records, works documentation etc.), but also those relating to the CMO's interests and standing generally.

(iv) General business contracts

Other contractual disputes may arise from non-performance by suppliers of goods and services in terms of service-level and other supply agreements. Litigation may also be instituted against the CMO where these suppliers feel that the CMO has defaulted in terms of such agreements. It would be crucial for the CMO to implement an effective and efficient contract management system to ensure that it does not default on any terms arising from supplier contracts, that it does not allow a contract to lapse which it should have renewed, that it does not permit an undesirable contract to be renewed automatically by failing to give notice of termination etc. This may for example occur in respect of property and accommodation agreements, where the CMO may fail to renew a lease or fail to cancel it, resulting in serious ramifications for the CMO. The CMO may also get into trouble by not implementing a proper contract authorization limit policy which indicates the levels of management authorized to enter into particular contracts and the monetary limits related to that. If an unauthorized manager enters into a contract with a supplier by giving the impression to the supplier that he or she was authorized to enter into such a contract this can create risks for the CMO and a liability to perform under such a contract, depending on the law applicable in each country.

4.14.2 Infringement of Copyright and other Non-contractual Litigation

4.14.2.1. Infringement of Copyright

76. Infringement of copyright takes place when users continue to use copyright works without procuring a license or obtaining some other form of authorization from the CMO or rights holders. Copyright infringement has traditionally been categorized into (i) primary or direct infringement and (ii) secondary or indirect infringement. *Primary infringement* takes place where a user performs acts that can only be exclusively performed or authorized by the copyright owner, without obtaining such authorization. The acts referred to here relate to the *bundle of rights* that the copyright owner has in respect of the copyright work concerned, e.g. reproducing the work, broadcasting the work, communicating the work to the public. On the other hand, *secondary infringement* takes place when a user performs certain identified acts (e.g. permitting the place of public entertainment to be used to infringe copyright; where this is applicable, the unauthorized importation of copyright works etc.). The essential difference between primary infringement and secondary infringement is that in the case of primary infringement the user does not need to know or be aware of the fact that the act concerned constitutes copyright infringement in order for infringement to take place, while in the case of secondary infringement, the infringement only takes place if the user knew that the act concerned constituted copyright infringement.
77. Remedies for copyright infringement can either be of a civil or criminal nature, although in the majority of cases parties have used civil remedies (e.g. an interdict/injunction against the infringing party; the payment of a reasonable royalty; the payment of damages etc.). We outline below some of the practical steps that may be taken when preparing for the institution of civil proceedings in relation to the infringement of copyright:
- (i) A choice needs to be made of an appropriate 'target' for infringement proceedings. In some countries, it is not always possible to institute infringement proceedings against all recalcitrant users and a choice has to be made as to which infringer the CMO 'will go for'. Some of the considerations to be made in this regard include the income generated by the user; the flagrant manner in which the user infringes upon the rights; the precedent-setting nature of the case against the infringer etc.;
 - (ii) Co-ordination and liaison with various CMO departments (e.g. the legal department, the sales/licensing department etc.);
 - (iii) Compilation of past written and other communications (reports by CMO representatives/agents) with/to the infringing parties;



- (iv) Actual evidence of restricted acts being undertaken and the detailed flagrant and repeated nature thereof. These acts need to be documented through physical evidence (e.g. audio or video recordings made of the infringing acts), infringing copies – in the case of mechanical rights, affidavits from witnesses, agents and others procuring the evidence (as well as other supporting affidavits), chain-of-title affidavits (from authors, publishers, directors, script writers, producers, CMOs, foreign rights holders and affiliated CMOs etc.); listing of identified works being infringed;
- (v) Identification of the CMO's legal chain of title (where rights were assigned), which involves obtaining chain-of-title affidavits (domestic or foreign) from the above authors etc., a representative of the CMO instituting the infringement action, foreign rights holders and affiliated CMOs (where foreign rights are involved) etc.; copies of affiliation contracts/deeds of assignment/exclusive or non-exclusive licenses, relating to the work/s concerned; Powers of attorney/locus standi to sue, obtaining assistance from original rights holders where no assignment or exclusive license was given (e.g. asking the rights holders to join the action as co-plaintiffs) etc.;
- (vi) Correct identification and citation of the infringing party/ies (natural person, legal person, nomine officio/official capacity), its/their responsible officials, and addresses for delivery of 'court process';
- (vii) Analysis of infringement evidence/recordings by experts (e.g. musicological experts), to verify if these relate to the works controlled by the CMO;
- (viii) Securing all the CMO's original evidence;
- (ix) Briefing of local witnesses and members/rights holder involved.

4.14.3 Formulation of the Letter of Demand to the Infringing Parties

- (x) Choice of External Law Firm/and Counsel;
- (xi) Communication with Management and CMO Board on Pending Action;

- (xii) Preparation of the Particulars of Claim including all associated documentation;²¹⁸ and Regular Reports and Updates to Management and Board on Progress of Litigation.²¹⁹

4.14.4 Other Non-Contractual Litigation

- 78. Some areas of non-contractual litigation where further work is generally required in obtaining evidence for the legal process include: (i) Disputes between members/rights holders amongst themselves as to the documentation and legal chain of title to works/catalogues in the absence of written agreements – a situation which affects the CMO's documentation database; and (ii) disputes between members/rights holders amongst themselves as to the authorship or ownership of works/catalogues, again affecting the CMO's documentation database.

4.15 Other Legal Matters

4.15.1 Contract Negotiations, Drafting and Review/Vetting

- 79. It is generally the duty of members of the CMO's legal department/section to assist with the negotiation of CMO contracts (including licensing contracts with music users and contracts with suppliers), especially where legal issues/arguments are being raised. The legal department's duty, however, does not only end with the negotiation of contracts. Members of the CMO's legal department/section must also draft the CMO's core business contracts (sometimes with the assistance of outside attorney firms) and must also review/vet contracts proposed to the CMO by third parties. Some of the contracts that members of the legal department/section must assist in drafting and/or reviewing include *members'/rights holders' affiliation/membership agreements* in respect of the various rights administered by the CMO; *international affiliation/representation agreements* with other CMOs, which must also clearly indicate the bundle of rights administered and the territories covered in such agreements; other *agreements of a bilateral or unilateral representation* (indicating the bundle of rights and the territory of representation); *standard blanket licenses/user agreements*, which must clearly indicate the bundle of rights covered by the license; *special blanket license agreements* relating to online and new media usages, which would

²¹⁸ It may be advisable for the CMO's internal Legal Counsel to make the first draft of the Particulars of Claim because of his/her understanding of the CMO's business and the contribution he /she can make to this process.

²¹⁹ Comprehensive, regular reports to Management and the Board should be prepared in relation to the total number of infringement cases being undertaken, clearly reflecting what stage in the litigation process any of the cases are in.



cover the national territory; *special blanket cross-border/multi-territorial agreements*, which often appear in hybrid form and relates to specific repertoire; *blanket once-off transactional license agreements* dealing with limited repertoire; *fixed-term agreements (agreements that terminate at a certain designated period)*; *indefinite agreements* (continuing automatically and renewed or cancelled upon the giving of a notice), and various other business and third-party agreements, including service level agreements.

4.15.2 Contract/Document Management

80. Apart from contract drafting and reviewing, the legal department/section (or other CMO function such as the office of the company secretary) is also usually also involved with implementing a system of contract and other document management, as highlighted above. Often this involves the use of software that notifies staff members when a certain milestone has been reached in the life of the contract (e.g. when the contract is due for renewal, when a notice needs to be issued, when payment needs to be made etc.). This is to minimise risk arising from contractual default and to maximize the benefits arising from contracts concluded by the CMO with third parties.

4.15.3 Repository Activities

81. The Office of the Company Secretary (which may also be the legal department/section) also acts as a repository for important documents relating to board and company activities, such as the certificate of incorporation; the CMO's constitutive documents (including its memorandum and articles of association, membership and distribution rules); membership/affiliation/representation agreements; the CMO's license to operate, where applicable; a repository of important legislation relating to the CMO's operations (including various intellectual property legislation and regulations); precedents of important court cases; the schedule of countries that have given a mandate of representation to the CMO, or to which the CMO has given a mandate ('mandated countries'), included the CMOs concerned and the general information about the rights/catalogues involved; history files of CMO negotiations, important terms or 'deal points' etc. and other important 'legacy files' that would need to be referred to occasionally for particular purposes (including the provision of evidence in court).

4.15.4 Internal General Counsel to CMO

82. The legal department/section also serves as a source of general legal advice to all sections of the CMO, as well as being involved in general legal risk management and sometimes also acting as the office of the company

secretary dealing with statutory and other corporate governance compliance. Some of the in-house legal counsel roles of the legal department/section include:

4.15.5 General Counsel to CMO

83. The legal department/section works with all line control functions ensuring compliance risk mitigation, in particular the licensing department, credit control, finance department (in respect of taxation matters) and the CEO's office, to ensure that achievement of the CMOs objectives.

4.15.6 General Legal and Business Affairs

84. This involves providing the CMO's management and various business units with legal advice and guidance on all matters relating to the general business environment. It also includes providing legal advice relating to the general laws of the country, e.g. corporate law, contract law, employment law, property and leases, taxation, debt collection, intellectual property law (trademarks, copyright etc.) and others etc. The legal department/section is also responsible for maintaining and managing relationships with specific local general/corporate law firms and external counsel.

4.15.7 Specialist Legal Matters

85. The legal department/section is the first point of contact in respect of information and/or advice on copyright law and counsel on technical legal issues and/or the interpretation of legal concepts and cases. This specialist role of the CMO includes maintaining relationships with specialist local copyright law firms and external copyright counsel and maintaining contact with legal counsel at affiliated CMOs (in particular those foreign CMOs whose repertoire is active in the territory of the CMO in question). The legal department is also responsible for soliciting external legal advice and opinions on behalf of the CMO, often based on an approved list/panel of law firms.



SCHEDULE OF SIGNIFICANT TOOLS IN UNIT 4

Finance and Administration matters:

Financial Management Policy

Standard Financial and Management Reports

CMO Budgeting Templates (Operating and Capital Expenditure)

Cash Flow Management Template

Distributable Revenue Computation/allocation Template

Key Departmental Performance Measures (Quantitative and Qualitative)

Risk Management Policies and Procedures

Legislative/Regulatory and Legal Matters:

Copy of Copyright Legislation

Copy of CMO Regulations

Copies of International Treaties (Berne, WCT, TRIPS)

Compendium of Most Important National Laws

Alternative Dispute Resolution Procedures (Internal and External)

CMO Litigation Policy (Contractual and Infringement)

Draft Particulars of Claim

List of approved External Law firms and Counsel

LIST OF REFERENCES

Wixley T and Everingham G *Corporate Governance – A Practical Guide for Effective Implementation* (SiberInk Claremont 2005)

UNIT 5

COMMUNICATIONS AND MARKETING PLANS FOR CMOs

INTRODUCTION

1. Business in general has been advancing through what some term the ‘post-information age’, especially in relation to the evolution and impact of the digital environment. The Emeritus Chairman of the Media Laboratory of the Massachusetts Institute of Technology, Nicholas Negroponte, wrote twenty years ago in his book *Being Digital* about the changes that would be experienced by humanity in coming years and some of his views of the future.²²⁰ In relation to CMOs, it is also evident that the music business has undergone dramatic transformation in these past twenty years, especially in regard to how digitization has affected the way in which music is being personalized and consumed. Nevertheless, it has only been over the past decade or fairly recently that some CMOs have come to recognize the role of communications/public affairs and marketing in their strategic planning processes. In formulating and addressing its communications and marketing plans, much of the information assembled in the strategic review processes and the environmental scans is of relevance and importance to a CMO. Further to this, the licensing practice section in Unit 3 should also be read in conjunction with the communications and marketing sections below. It needs to be also understood that there is often an overlap between the concepts of communications and marketing and it is important to bear this in mind when reading the two modules. Furthermore, the two modules relate closely to all sections in the tool kit and in a sense act as a ‘delivery mechanism’ for the CMO’s goals and outputs.

A. COMMUNICATIONS

5.1 Role of Communications for CMOs

2. Communication is a relatively young science compared to some other business disciplines in existence today. There were times when a CMO’s communications function was seen as a support or ancillary activity with limited focus placed on its relevance. This is of course no longer the case. In today’s world of instantaneous communication of data, information, ideas, news, events etc. via electronic, social and other media platforms, the role and prominence of a communications function within a CMO has been re-evaluated by many societies. The importance of communications

²²⁰ See Negroponte N *Being Digital* (Hodder & Stoughton London 1995) pages 227-231



becomes relevant even if a CMO were only to focus on each of its core constituencies of members/rights holders and licensees/users. Today even small CMOs sometimes have a membership that is comprised of several thousand national members or rights holders. When one adds to this the representation of foreign rights holders and the large numbers of licensees/users of the rights of members (many times reaching to the thousands), one gets a glimpse of the internal and external communications challenges faced by CMOs. Irrespective of the communications challenge faced by a particular CMO, a CMO's communications policy and practice needs to line up with the organization's mission and values and any other codes of business conduct to which the CMO subscribes.

3. Corporate communication in CMOs has taken its place alongside other key management functions including licensing, documentation, distribution, legal, finance and related activities. Put simply, a CMO's communications department/function is a management function within the society which, like any other department, needs to be aligned with the strategic goals and objectives of the CMO. The special focus of the communications department/function is the distribution of information to various primary and secondary stakeholders and other key 'constituencies' of the society. The Financial Times defines corporate communications as including the preparation of 'messages' created for a variety of internal and external audiences/parties and the communication/transmission of those messages to such audiences/parties.²²¹ This definition provides insight on how a CMO should view its communication function.
4. The role of a CMO's communications function is one of assisting and supporting the achievement of the society's overall business goals and objectives as well as managing its image and reputation. In view of the *de facto* monopolistic models of collective licensing of rights around the world, it is essential that a CMO is able to address its constituencies at the correct levels and in a clear, succinct and appropriate manner. A CMO's members/rights holders are music and audio-visual business entities and professionals dependent upon the CMO for a part of their annual earnings. As with shareholders in an ordinary business enterprise, these members/rights holders have a material interest in the CMO's performance, its prospects of success and its general undertakings. It is therefore important for a CMO to address the information needs, views, perceptions and expectations of its members/rights holders. The licensees/users of rights usually do not have a choice of alternative suppliers/licensors of rights and at times therefore

²²¹ See <http://lexicon.ft.com/Term?term=corporate-communication> (accessed 9 February 2015)

have particular views towards CMOs as single channel suppliers of rights. The experiences, views and perceptions of CMO members/rights holders and their licensees are very important for the good standing and reputation of a CMO. In writing about the handling of communications around the illness of the late President Mandela, Tshepo Matseba (former President of the Public Relations Institute of Southern Africa [PRISA]) wrote ‘corporate communication and reputation management are inseparable’.²²²

5.2 Levels of Communication

5. Without going into detail regarding communications theory, a CMO must consider the different levels, forms and directions that business communications can take. This will help to ensure clarity and good understanding in the development of a communications plan. Whether a CMO and its management are aware of it or not, communication occurs all the time. A communications plan is, however, necessary to ensure proper implementation of the organization’s communications strategy. Furthermore, if not managed carefully, objectives and outcomes will not be as predicted or planned for in the communications plan. Communication can be *verbal* or *oral*, such as where CMO staff undertake to carry out certain work and communicate verbally to ensure that the work is carried out as planned and that its objectives and outcomes are understood. On the other hand, *non-verbal* communication refers to cues taken from or meaning attached to body language, attitudes, deportment, attire etc., by listeners, observers or members of an audience. The cues are important as they may reinforce, contradict or confuse the message which a communicator is trying to deliver. Staff whose responsibility it is to be involved in regular communication within or outside a CMO should have a good understanding or appreciation of the impact of such cues and messages in order to communicate effectively.
6. To ensure good communication, an understanding of the direction or flows which communication can take is also important. Traditionally three forms of organizational communication flows have been recognized, namely (i) *vertical (downward or upward)*, (ii) *horizontal* or (iii) *lateral and diagonal*. Often this relates to the type of organizational structure adopted by a CMO, how authority and responsibility is devolved within the society, the CMO’s ‘corporate culture’ and how information is generally transmitted. What is important is to understand that good communication flow is influenced by different circumstances and suitable attention thus needs to be given to

²²² See PRISA at: <http://www.prisa.co.za/news-and-media-center/feature-articles/55-communicika/368-corporate-communication-and-reputation-management-are-inseparable> (accessed 9 February 2015)



the manner in which a CMO communicates, depending on the prevailing circumstances.

5.3 Consideration of Delivery 'Channels/Mediums' to be Used

7. The choice of a specific or appropriate delivery channel or medium for various messages from a CMO to internal or external stakeholders is a matter which is often determined by local environmental circumstances. There are some general rules in the choice and appropriateness of channels or mediums but each CMO is usually the best judge of its own environmental situation and how to communicate with its stakeholders, whether they are primary or secondary, internal or external. We provide below some of the more common CMO delivery channels for messages to its stakeholders from which choices can be made when developing the communications plan.
 - a. *One-on-one meetings* – for internal CMO meetings between staff *inter se* or with a supervisor; possible member/rights holder interactions with CMO customer support to address queries and/or claims; licensing key account managers and staff interface with existing or potential licensees regarding rights obligations etc.;
 - b. *Mailbox/suggestion box* – use is still made of traditional CMO suggestions boxes, whether physical or electronic; these are strategically located for staff, members/rights holders or even for input from licensees;
 - c. *Team meetings* – between members of staff working in a particular department; regular cross-departmental meetings to review CMO progress; formal meetings of CMO management to fulfil organizational reporting, control and risk responsibilities;
 - d. *Intranet/internal email* – the linkage of CMO staff via dedicated internal electronic office mail systems;
 - e. *Tele-marketing* – activities associated with telephone operations in the areas of member recruitment, telesales licensing activities, call center operations etc.;
 - f. *Traditional mail* – use of what is sometimes termed 'snail mail' – a service offered through regional, national, public or private postal authorities;
 - g. *Short message service/text messaging* – in the world of electronic commerce and instant communication, some CMOs find the SMS system quite advantageous for short notices to members and rights

holders on a number of matters which involve large numbers of members; other CMOs use the SMS system to follow up on outstanding license fees etc.;

- h. *News/letters* – although the traditional form of newsletter may be becoming obsolete, the concept of a communication providing short but informative news items about the CMO and its activities to staff, members/rights holders and licensees/users is still very much part of a communication plan;
- i. *Email* – by and large email appears to have overtaken the role of traditional mail except to a certain extent, in the more formal and legal situations;
- j. *Magazine/E-zine* – many traditional CMO magazines have moved to the E-zine format and much of what has been said about newsletters would apply here, in respect of both members/rights holders as well as licensees/users;
- k. *Help desk/center* – use is made of call-in or walk-in centers to disseminate assistance and information to members/rights holders and licensees/users;
- l. *Workshops/seminars* – whether the event is focused on CMO staff, members/rights holders or licensees/users, this delivery medium does not seem to have lost its place in the delivery of more detailed and technical information where the objective is more of an educational and/or developmental nature;
- m. *AGM/SGM* – this channel for formal communication with members/rights holders of a CMO to address statutory and related matters is once again gaining interest and popularity. The expansion of the broadband applications of musical/audio-visual works in various countries has resulted in dramatic increases in usage of works. In view of this CMOs have reported significant improvement in attendances at society annual general meetings as well as at special general meetings by concerned members and rights holders;
- n. *Board advocacy/ambassador groups* – the existence and use of a group of CMO board members or rights holders with communication and/or lobbying skills to address various subjects of copyright and collective management (including in respect of lobbying) has proven invaluable for the society at special times;



- o. *CMO media spokespersons* – in today's fast-moving world there are often times when a CMO is required to make public announcements and to respond timeously to events, inquiries or media articles. Many CMOs designate certain senior members of staff or employ specialist persons to speak on behalf of the society. Irrespective of who are designated as media spokespersons, special media training for CMO executives and senior management officials is advisable to ensure better communication and readiness to deal with such situations;
- p. *Traditional print media (General, Business, Arts & Culture etc.)* – although there is much ongoing debate about the future of the print media in general, many publications, broadsheets and their smaller competitors still remain vibrant and key opinion makers;
- q. *Roadshows/campaigns* – the use of roadshows or campaigns in drawing attention to serious matters relating to a CMO's business, and often involving leading members and rights holders, is still a delivery medium used by quite a number of CMOs, in particular in developing regions of the world;
- r. *Outdoor media* – billboards, the interior and exterior of vehicles or other forms of transport and related outdoor signs have been used by some CMOs in mass media campaigns where the objective has been to attract the attention of the general public;
- s. *Broadcast media – Radio & TV* – in spite of the perception that relations between CMOs and the broadcast media are less than what they could be, CMOs do use radio and television to communicate with core stakeholders;
- t. *Social and/or web media* – many CMOs have a presence on various web and social network sites and platforms as part of their communications activity. Tech Target Inc. provides a short but clear definition of 'social media', as '... the collective of online communications channels dedicated to community-based input, interaction, content-sharing and collaboration'.²²³ Web or social media sites take a variety of forms. Some of the more popular sites in which many CMOs have a presence include: *Facebook, Instagram, LinkedIn, Twitter, Wikipedia* and *YouTube*.
- u. *CMO Website* – All CMOs today should have an online presence. The sophistication of such CMO sites varies from a modest number of static pages providing basic information on the CMO and its activities, listing further alternative contact details to a fully interactive site which permits

²²³ See <http://whatis.techtarget.com/definition/social-media> (accessed on 22 February 2015)

visitors to transact with the CMO (whether the visitor is a casual inquirer, a member/rights holder or a licensee/user). A good CMO site should be easy or user friendly to navigate, reflect accurate and current CMO content, have an acceptable response time in navigating pages, be able to facilitate E-commerce with stakeholders, provide a strong search facility and contain a site menu/map.

5.4 Developing a Communications Plan

8. The objective of a communications plan is to give expression to the high level overall strategic plan of the CMO. Good communication with key stakeholders/constituencies will enhance the brand or image of a CMO and perceptions about it as it seeks to deliver on its mandates and build balanced business and industry relationships. A CMO's communications plan needs to be developed around the same time as the CMO's other planning. Put differently, when a CMO undertakes its ordinary long- and medium-term planning activities, the communications strategy should form part of the CMO's overall long-term strategic outlook. Similarly, the short- to medium-term objectives for the communications function should form part of the annual planning and review sessions. Furthermore, it needs to be noted that, depending on the CMO concerned, the communication plan may form part of an overall marketing plan or be a stand-alone plan.
9. One of the first steps in devising a communications plan or improving on any existing plan would be to undertake a review or audit of the CMO's current communications activities, including its capacity and capabilities to disseminate information to its stakeholders (constituencies or audiences) – both within the society as well as outside the society. Such a review or audit could be undertaken by an external communications specialist or it could be done by the CMO itself. In any event, the objectives of the review would be to (i) make an assessment as to the relative strengths and weaknesses in the CMO's current communications plan (or communications processes, where no plan exists); (ii) identify any gaps which may exist, and (iii) arrive at a set of conclusions and recommendations, with the goal of building on the existing strengths and addressing any existing weaknesses. If the review process is not undertaken at the same time as the CMO's strategy development activity, reference should be made to the CMO's strategic plan²²⁴ and the parties identified in the *stakeholder review*. It will be recalled that two categories of stakeholders, namely primary and secondary are to be identified and each could be further subdivided into those stakeholders that are internal to the CMO and those that are external. The stakeholder

²²⁴ See Unit 2 for more on Strategy Development and its elements.



review also lists the respective expectations and/or requirements which the identified stakeholders have from the society. The identified stakeholder list should provide a fairly comprehensive 'audience' listing, highlighting persons and entities that the CMO is or should be communicating with.

10. When developing a communications plan, a number of 'elements' in the communications process which need to be addressed are often identified. For CMOs, these elements would include: (i) *the identified stakeholders*, (ii) *the key messages or subject-matter to be communicated to these stakeholders*, (iii) *the communications materials/tools to be used*, (iv) *the communications channel or medium in delivering the messages*, (v) *levels or types of communication*, (vi) *the feedback from or responses to the audience to whom the communication is addressed* and (viii) *spokespersons or communications specialists, who are responsible for conveying the communication*. Each CMO will face unique circumstances and environmental factors. Therefore, when developing its communications plan, a CMO will choose and use those elements which particularly suit its circumstances in a combination or permutation which meets its strategic objectives. For this reason, we table below a breakdown of examples of some the abovementioned elements and how these would be dealt with in a CMO's communications plan:

5.4.1 CMO's stakeholders or audiences

11. *Primary Stakeholders/Audiences may include:*

CMO Staff – Individual staff members of the CMO from all levels and regions of its operations, including staff-member associations or unions representing CMO staff;

Members/rights holders of the CMO – both resident and non-resident national members/rights holders as well as international affiliated CMOs or foreign rights holder groups represented by the CMO;

Board of Directors – the Board as a whole and its various Board sub-committees as well as individual Board members, whether they are executive directors, non-executive directors, government representatives or independent directors;

Member Associations and Industry Organizations – this list may vary between CMOs but where such associations/organizations have a right to appoint a board member this may include Creators associations, Publishers associations, Directors' and Scriptwriters' Guilds. In addition, international

federations of CMOs or rights holder associations representing foreign CMOs etc. would also be included;

CMO repertoire Licensees/Users – specific users that hold license agreements/contracts with the CMO, other users who are not yet licensed and prospective licensees of the CMO’s repertoire;

Representative Trade and Industry Bodies – these would include national and other associations of Broadcasters; associations representing Telecoms companies, ISPs and DSPs; Associations of Cinema operators; Producers’ associations; Federations of Chambers of commerce; Hotel and Accommodation associations; Provincial/Local Government associations and other representative associations of users (where such bodies undertake certain *contractual arrangements* with CMOs).

12. *Secondary Stakeholders/Audiences may include:*

National Copyright Office or Regulator – where the legal dispensation provides for a system of regulation or licensing of CMOs, the government department or agency responsible for oversight or regulation of CMOs would be an important stakeholder;

Representative Trade and Industry Bodies – these were mentioned above, however where such bodies do not undertake any contractual arrangements with CMOs but merely *facilitate communication* with their members, these would be seen as secondary stakeholders. As in the case above, these include national and other associations of broadcasters; associations representing telecoms companies, ISPs and DSPs; associations of cinema operators; federations of chambers of commerce; hotel and accommodation associations; provincial/local government associations and other representative associations of users;

Public Sector Services/agencies – the communications authority (i.e. the national organization responsible for allocation of transmission frequencies and oversight of the wider tele-communications industry, by whatever name it may be known); police and justice departments (responsible for law and order – relating to criminality on infringement of copyright); customs and excise (with reference to control and oversight of importation of sound and visual carriers, excise duties payable etc.); national tourism boards, etc.;

Government decision makers – these could be subdivided into national/federal/state/provincial and local government. In any event, the legislature (with members of parliament and special parliamentary portfolio committees); the executive (with a focus on the various senior officials in specific departments including Trade and Industry, Arts and Culture, Communications/



Broadcasting, Justice/Attorney General etc.) and the judiciary (with its magistrates associations, judicial services commissions, bar councils and attorneys' associations) are convenient groupings;

Bankers/Suppliers of Credit – parties with which the CMO transacts financially on a daily basis;

Media/Journalists – involving the national general press, the business/trade press, consumer publications, broadcast media, on-line media, bloggers etc.;

Academia/Places of Learning – selected tertiary institutions and academics with interests in collective management, copyright, music and film education etc.;

General Public – as a business, a CMO operates in society and cannot be divorced from its wider environment or issues.

5.4.2 Core Message/Subject-Matter development

13. In executing its role, a CMO communications department is responsible for the distribution of news and information on current developments or events, programs and related information associated with or affecting the CMO. While working on the implementation of its communications strategy a CMO's communications plan has to address a number of important questions, including the following: (i) what do its stakeholders actually know about the CMO?; (ii) what are the issues, matters or subjects which concern stakeholders?; (iii) what are the current stakeholders' views of the CMO?; (iv) what issues, matters or subjects does the CMO wish its stakeholders to know?; and (v) how does the CMO wish its stakeholders to view the society? In summary, a CMO should be focussing on core messages or subjects to be communicated to its stakeholders, how these relate back to the CMO's mission and values, and the deployment of the communications function in addressing stakeholders on such matters. Different messages are developed to address stakeholders' awareness and knowledge about the CMO. Nevertheless, all of the CMO's messages must (i) consider the diversity and demographics of the stakeholder groups, (ii) be founded on verified information and facts, (iii) preferably be short/brief, and (iv) be simple to comprehend.

The following highlights some simple examples of core messages for primary stakeholders:

Members/rights holders or potential members/rights holders

- a. There is significant benefit for individual rights holders in the collective management of (named bundle) rights;
- b. XYZ CMO is a (name of country) collective management organization administering the following bundle of rights...;
- c. XYZ CMO collects royalties for the use of musical/audio-visual works and aims to timeously distribute these to members/rights holders and affiliates;
- d. The copyright interests of XYZ CMO's members/rights holders are effectively and efficiently promoted and protected;
- e. XYZ CMO is one of the best organizations in (name of country) to work for.

5.4.3 *Licensees or users/potential users*

- a. Rights in musical/audio-visual works have value.
 - b. Research indicates that the use of these rights translates into improved business for licensees/users.
 - c. XYZ CMO is a reputable and accredited service organization representing the (named bundle) rights and the owners thereof.
 - d. Licensees/users in a particular market segments need to procure XYZ CMO's license to authorize specific rights uses.
 - e. XYZ CMO has equitable licensing schemes and relatively reasonable prices for nearly all types of usages.
14. As was mentioned earlier in this Unit, CMOs are often monopolies. In view of this, 'public' confidence, image and reputation are important issues for a CMO. For this reason, certain messages must be developed to address issues concerning a CMO's brand, image or reputation in addition to its normal operations. In some instances it is insufficient for the CMO to be only delivering messages without assessing feedback or responses from stakeholders. In such cases, the communications plan has to address the various methodologies to be employed to solicit such feedback.



5.4.4 Communications Resources and/or Tools

15. CMO communications departments are required from time to time develop or write standard communication and information resources or tools, each of which is designed to address particular stakeholders and cover certain subjects, questions or items of information which require to be communicated. Some resources or tools for special situations may be written by or commissioned from other departments in the CMO or specialists such as researchers, legal experts, financial experts etc., while used by the communications function in delivering plan results. Certain of these resources or tools may be used in addressing primary stakeholders whilst others are used to address secondary stakeholders, or used for both.

SAMPLE TABLE OF TYPICAL COMMUNICATIONS RESOURCES OR TOOLS

Advertisements – print/radio/television	News Stories
Audio-visual or PowerPoint presentations	Notices
Briefing papers	Pamphlets
Brochures on Collective management of rights	Podcast information
CMO annual report	Presentations (standard/special) on work of CMO
CMO customer service charter	Press kit on CMO
CMO Facts sheet/s	Press Releases
CMO statistical report/news	Research papers
FAQ (frequently asked questions)	Special Surveys
– Members/rights holders	– Internally generated Survey data
– Licensees/Users	– Externally commissioned Surveys
Interviews – various media	Speeches/addresses
Licensing information Tool kit	Staff policies
– New licensee/user	– Induction programs
– Existing licensee/user	– Training and development materials
– Common objections	
Member/rights holder information kits	Special recognition/awards
– Creator/publisher	– Staff
– Performer/producer	– Member/rights holder
– Scriptwriter/director/producer	– Licensee/user
Newsletters	Standard letters
– Staff	– Staff
– Member/rights holder	– Members/rights holders
– Licensee/USER	– Licensee/user

16. The creation of a communications plan would combine the various elements as identified above, resulting in a formal communications plan. An outline of such a plan may, in tabular form, look as follows:

PRIMARY STAKEHOLDERS 1: MEMBERS/RIGHTS HOLDERS AND CMO STAFF

Strategic Goal	Target Audience	Message	Channels	Type of Resource or Tool	Priority
Obtain rights	Rights holders	Value to join/ affiliate with CMO	Direct mail, email, website, help desk/ center	Member info kits	High
			Radio & television	Advertisement	Medium
			Recruitment campaign	Member info kits	Medium
			1 on 1 meetings	Conduct meetings	Ad hoc
		Reports on past activities and future prospects	AGM/SGM	Audited annual/ special reports	High
	Foreign Affiliates	Sign representation agreements	Direct mail, email, 1 on 1 meetings	Affiliation/ representation agreements	High
Effective operations	CMO staff	Great place to work for	1 on 1/team meetings, intranet, mail/ suggestion box	Notices, staff news- letters, information updates	High

PRIMARY STAKEHOLDERS 2: LICENSEES/USERS

Strategic Goal	Target Audience	Message	Channels	Type of Resource or Tool	Priority
Generate income	Licensees/users (major – broadcast)	Obtain CMO’s license, value of rights	1 on 1 meetings – key accounts managers	Licensing information Tool Kit	High
	Licensees/users (major – public performance)	- ditto -	- ditto -	Licensing information tool kit, brochures, pamphlets	High
	Licensees/users (major – reproduction)	- ditto -	- ditto -	Licensing information tool kit, brochures, pamphlets	High
	Licensees/users (mid-sized – general)	- ditto -	1 on 1 – licensing officers, direct mail, email, tele- marketing	- ditto - electronic versions of above	Medium
	Representative trade/industry bodies	Equitable licensing scheme of CMO	Direct mail, email, Workshops	Annual report, research papers, surveys	Medium



5.5 Creation of Plan Timetable

17. As has been indicated earlier, the actual choice of communications plan activities is dependent upon each CMO's strategic plan. The long term goals of such plans usually have a three to five-year time horizon which is often broken down into annual plans. The choice of key result areas and indicators of success for a communications plan depend very much on the CMO's chosen strategy, the type of CMO, the stage of development of the CMO and the bundle of rights actually administered. Some of the objectives have medium-term deadlines (e.g. for final results which may extend over a single year). In view of this, time-based milestones need to be set for measurement of progress within the period covered in the plan. In all cases, the timetable or calendar of activities is prioritized according to each CMO's strategic objectives.
18. CMO strategic objectives vary from CMO to CMO. For example, to a relatively new voluntary CMO, measures of the communications activities involving the (i) *representation of repertoire* from domestic and international rights holders would be a priority. Such a CMO would need to devise its communications plan and strategy at a very early stage. Such a plan needs to have a clear categorization of rights holders that the CMO wishes to target for membership recruitment to ensure that support is obtained from rights holders with very active repertoire (and the associations and/or unions representing them). For such a CMO, fairly short-term objectives such as monthly, quarterly and annual targets for member/rights holder affiliation could be set. On the other hand, communications activity measures addressing support for (ii) *changes in or amendments to national copyright legislation* will be different and may stretch beyond a single year or even two years in view of the time involved in legislative reform processes. Nevertheless, regular monthly and/or quarterly follow-up activities and update meetings with the relevant government departments, members of parliament and /or the members of the appropriate parliamentary portfolio committees, stakeholder groups and other supporters will have to be undertaken. Communication activities in support of (iii) *sales/licensing operations* will be dependent upon the exigencies of each market segment. In some mature user markets knowledge about the obligation to procure a copyright license for rights usage may be a *fait accompli*, with compliance and related issues being the norm and modest communications support activities required. In other very large but more 'green-fields' markets awareness about copyright licensing may be low or even negligible. Consequently, frequent communications and awareness programs would be required, using different channels to deliver the CMO's messages.

19.
- The communications plan timetable or calendar is a subset of the communications plan linked to timing and frequency of the prioritized activities.

EXAMPLE OF COMMUNICATIONS PLAN
TIMETABLE/CALENDAR

Month:.....

Strategic Goal	Audience	Plan activity	Message/s	Desired Frequency	Dates of Activities				
Obtain rights	Rights holders (major)	1 on 1 meetings	Value to join/ affiliate with CMO	Based on number of rights holders					
	Rights holders (other)	Invitation letters, direct mail/ email	- ditto -	Daily batch runs					
	Rights holders (national)	Radio/TV ads	- ditto -	Based on numbers and budget					
Generate income	Major users (various)	1 on 1 meetings	Obtain CMO license, value of rights	Based upon number of accounts					
	Medium users	1 on 1 Licensing officers, direct & email, tele market	- ditto -	- ditto -					
Legislative reform	Oversight dept. (government)	Board/ advocacy group, 1 on 1 meetings, direct & email	Need for changes in law, prejudice to rights holders	Regular, dependent upon progress					
	Parliamentary portfolio	- ditto -	- ditto -	Committee meeting days					
	Members of parliament	1 on 1 meetings, rights holders, direct & email	- ditto -	Based on number of meetings					

5.6 Regular Evaluation and Reporting

5.6.1 Outputs and Outcomes

20.
- From the strategic long-term plan, annual objectives would have been established with the communications department identifying corresponding actions and tactics with indicators of performance required, which now need evaluation and measurement on a regular basis. Such an evaluation/



measurement would need to take place at least once a quarter but often on a monthly basis. Reporting on planned activities should be both quantitative and qualitative. In customizing reporting for a particular CMO, regard should not only be had to quantitative activities (e.g. the undertaking of activities, events or actions and the frequency of such activities or outputs) but also to qualitative activities. A distinction between these *two types of measures* is made by Mills-Scofield when commenting on non-profits, when she observes that outputs involve the undertaking of such activities as programs, workshops, training and similar events or actions – ‘*the stuff that is produced*’ (*quantitative*); whereas outcomes relate more to – ‘*the difference the produced stuff makes*’ (*qualitative*).²²⁵ In the CMO’s communications plan, outputs, once identified, are frequently evaluated in terms of the description of activities, events or actions to be conducted as well as the number to be undertaken. The evaluation of outcomes tends to be the measurement of stakeholders’ responses to the said activities, events or actions. For example: was any knowledge transferred to the ‘recipients of information’ or were their views or behaviors towards the CMO changed in any way? Here, often there is significant convergence between communications and marketing plans and care should be taken to address any overlap.

21. As part of the evaluation of and reporting on a communications plan, outputs are probably measured more easily in the short-term whereas outcomes – although still part of the reporting process – may take a more medium-term or longer period to evaluate. It is common for communications departments/ functions to report on both measures to CMO management on at least a monthly basis. Communications departments/functions may measure their own performance more frequently. Various indicators customized to each CMO’s circumstances can be developed to assess and evaluate the overall results of the communications strategy in support of the overall marketing objectives of the CMO. To illustrate the evaluation of a plan using the above measures, the table below, when completed and expanded to cover the full communications strategy, could be used to report on and monitor the results of the plan. Using three of the examples in the outline of communications plan above, the evaluation table could look like the following:

²²⁵ See Harvard Business Review at <https://hbr.org/2012/11/its-not-just-semantic-managing-outcomes>

COMMUNICATIONS PLAN – EVALUATION AND REPORTING

Month:

Target Audience	Message	Channels	Type of Information	Outputs (Quantitative)	Outcomes (Qualitative)
Rights holders	Value to join/ affiliate with CMO	Direct mail, email, website, help desk/ center, radio & TV, campaigns, 1 on 1 meetings	Member info kits, advertisements, presentations	Number of new members;/ attendance at campaigns/ meetings?	To what extent did the members/ prospective members fully understand the rights they granted to CMO?
CMO staff	Great place to work for	One on one/ team meetings, intranet, mail/ suggestion box	Notices, staff news-letters, information updates	Staff turnover rate?	How well motivated and productive is the staff; what is quality of participation & feedback?
Licensees/ users (major)	Obtain CMO's license, value of rights	Senior executive/ Key account manager	Licensing information tool kit	Number of major users signed?	Have views about CMO been influenced – positively? If so, how?

5.7 Special Crisis/Disaster Section

5.7.1 Risk and Crises or Disasters

22.
- In its strategy development, a CMO will have considered the issues around the governance, risk and sustainability of the society. Furthermore, most CMO boards have a dedicated sub-committee whose responsibility is the oversight for risk identification and management and the CMO's sustainability. It should therefore be possible to list certain potential negative events or circumstances which might occur during a CMO's operations, and to devise plans to mitigate against such events/circumstances. However, by virtue of their nature, crises and disasters are often unpredictable. It may be helpful to try and provide a working definition of both a crisis and a disaster. In this regard, however it has been said that there is no universally accepted definition for either a crisis or disaster.²²⁶ It is, however, possible to define a crisis as a period or time of risk, vulnerability or threat *which may have* significant implications leading to material loss for the CMO. A disaster on the other hand may be defined as a sudden event or occurrence which *has*

²²⁶

See Shaluf IM, Ahmadun F and Said AM 'A review of disaster and crisis' (2003) Disaster Prevention and Management: An International Journal, Vol. 12(1) pp.24 – 32



disrupted or caused serious impediment to the operations, infrastructure or staff of a CMO and which may possibly lead to the CMO’s failure.²²⁷

23. It is important to appreciate that a CMO communications function will not normally be responsible for the full crisis or disaster plan but rather only for the communication aspects around the occurrence of the unpredicted event. The master crisis/disaster plan would cover such issues as (i) *definition of what would constitute a crisis or disaster*; (ii) *the list of staff members who constitute the CMO’s crisis/disaster management team, and their contact details*; (iii) *procedures and processes around the immediate management of the crisis/disaster*; (iv) *real-time response guidelines*; (v) *incident or event assessment*; (vi) *overall management of the incident*; (vii) *crisis communication* and (viii) *post crisis review*. All CMO communications plans should contain a section on the role and activities of the communications department in the event of a crisis or disaster. Detailed hereunder are some of the more common elements contained in a crisis or disaster communications plan:

SOME ELEMENTS OF A CRISIS/DISASTER COMMUNICATION PLAN

CMO policies on crises and disasters (including security of staff and assets)	Press kit on CMO (Including both standard and technical issues)
CMO communications policies & procedures	CMO official spokesperson/s
Key Crisis Team member list	Media & Other Inquiry Logs
Standard message/s list	Communications team internal meetings
Crisis/disaster communications team list	Stakeholder communications (board, staff, rights holders)
Preferred communications channels	Crisis/disaster team updates
Media statements	Post crisis/disaster communications review

B. MARKETING

5.8 Marketing for the CMO environment

24. Throughout this tool kit, the writers have alerted readers to the practical but sensitive issues faced by CMOs, in particular the fact that those societies which administer rights on a collective management basis tend, in many countries, to be de facto or sometimes de jure *single channel* suppliers of a particular bundle of rights licensing services – or put simply, they tend to be monopolies. This presents a number of challenges which have to be

²²⁷ See further in this regard *ibid*.

addressed by CMOs with reference to their overall activities but especially their membership and licensing operations.

25. What then is the role of marketing in CMOs? It is actually quite similar to the role of marketing in any organization but with some added complexities and variations. It would be important to first agree on what marketing is and what marketing concepts involve. There are clearly many definitions but Philip Kotter states that ‘marketing is the science and art of exploring, creating, and *delivering value to satisfy the needs of a target market* (at a profit)’.²²⁸ Kotter further indicates that some of the important concepts in marketing include segmentation, targeting, positioning, needs, wants, demand, offerings, brands, value and satisfaction, exchange, transactions, relationships and networks, marketing channels, supply chain, competition, the marketing environment, and marketing ‘programs’.²²⁹ From this, we can deduce that quite a number of the principles and concepts in marketing have relevance to the operations of a CMO and have also been addressed in some measure in the section on communication above.
26. Whatever the structure or size of a CMO, the science of marketing has relevance to a CMO, whether this concerns its relations with the rights holders (suppliers) of the bundle of rights which it administers, or the licensees/users of these rights. In this section, we shall restrict the marketing discussion to that applicable to the sales/licensing function of CMOs only. It is however important to note that marketing principles and concepts also apply to the relationship between a CMO and its members/rights holders. This is because in many countries, if rights holders wish to have their works licensed for certain uses on a collective basis, they are also faced with limited options but to approach a CMO.
27. While the function and operations of a marketing department is viewed by many CMOs as being wider than just dealing with sales/licensing operations, many CMOs do appear to locate the marketing function close to their sales/licensing function. This may be due to the fact that the marketing function often contributes significantly to the development of a CMO’s sales/licensing initiatives in a number of ways. These include (i) undertaking licensing/user market research; (ii) creating awareness about the CMO’s operations; (iii) investigating new approaches to persuading users to obtain licenses; (iv) identifying new user/licensee markets; (v) generating ‘leads or prospects’; (vi) supporting the development of new licensing tariffs; (vii) investigating

²²⁸ See –‘Dr Philip Kotter answers your questions on Marketing’, in response to question 3, available at http://www.kotlermarketing.com/phil_questions.shtml. (last accessed ...), emphasis added.

²²⁹ *Ibid.*



cost effectiveness in growing licensing income segments; (viii) developing the CMO's image and branding; and (ix) in some cases, involvement with or overseeing the functions of communications and public relations. Nevertheless, wherever the marketing function of a CMO is located, it is significantly involved in providing services in support of the activities of the sales/licensing function. Readers may refer to Unit 2 of this Tool Kit where the traditional 'marketing mix' in services industries is briefly mentioned, i.e. the seven key elements of: *product (service)*, *price*, *place*, *promotion*, *people*, *processes* and *physical evidence*. Given the need for CMOs to maximize limited resources as well as their non-profit status, the support of applicable marketing science principles and techniques is very important in matching the delivery of rights licensing services to users of rights with the optimization of distributable revenue to a CMO's members/rights holders. While the application within CMOs of certain concepts may vary, the principles of marketing in a society remain applicable and should be read together with the section on Communications under A above, as well as the section on Licensing Practices in Unit 3.

5.9 Developing a Marketing Plan

5.9.1 Planning

28. Like all other operational plans, marketing plans have their origin in a CMO's long-term strategy and its mission and values, which set the landscape for all departmental goals and objectives. The time horizon of a CMO's strategic plan is very much dependent upon local circumstances but is typically a period of three to five years. As the CMO's overall goals and objectives are set, each department's role and plans are concretized and rolled out. Thus the marketing department's planning would usually take place at the same time as the strategic planning session (including Communications planning) and then translated into time-based (usually annual) plans. The information from environmental scans, the SWOT analysis and related materials generated in the CMO's strategy planning sessions would also inform the marketing plan development. Should the marketing plan cycle not coincide with the CMO's regular planning session, a separate planning exercise would have to be undertaken generating similar (but current) inputs. As with many planning exercises, marketing planning is process driven and can be divided into three discrete stages, namely (i) the *previous strategy re or over-view* with a corresponding audit of past marketing plans, including consideration of outcomes of the traditional SWOT matrix structured analysis, environmental scan (including past economic/financial outcomes) results and an assessment of the validity of earlier assumptions made; (ii) *current*

strategy formulation, where the outcomes and results of the strategy re or over-view (both quantitative and qualitative) of the previous plans are used as inputs in the creation of the new strategy formulation by bundle of rights market segments and services, addressing any identified ‘gaps’ in the re or over-view, documenting current assumptions and generating forecasts; and (iii) *strategy execution* where an approved marketing plan is implemented, monitored and evaluated with any subsequent remedial actions to be undertaken.

5.10 Typical Process Steps in a CMO Marketing Plan

5.10.1 Strategy Re or Over-view

a. Historic Review – Quantitative

29. A review and analysis is undertaken of the **consolidated financial results** summary as reflected in audited annual reports covered by the previous plan. This is further broken down into the segmental financial results of **income generated** in relation to the previous marketing plan (usually sourced from the CMO’s management accounts) which is then considered by:
 - (i) Bundle of rights administered – (performing rights, reproduction rights/private copy), which will be further analyzed into;
 - (ii) Major divisions of rights bundles, divided into – broadcasting, public performance, new media; broadcast mechanicals, phono-mechanicals, synchronization (where applicable) and private copy (blank media and recording equipment); new media (making available/communication to public) – in currency amounts and numbers of licensed users, which are then segmented into;
 - (iii) Major categories of divisions such as broadcasting (radio, television, cable/satellite); public performance (major user types and minor user types); new media (major ring-back tone operators, streaming services, subscription services and other content aggregators); broadcast mechanicals (radio and television, beyond ephemeral use, catch up services [where applicable]); phono-mechanicals (major producers/reproduction plants and other operators); synchronization (radio and television [where applicable]); private copy (blank media [CD, DVD, USB etc.], recording equipment [audio, video. mobile etc.]); and international income (performing rights, reproduction rights/private copy and sub-sections thereof);



- (iv) Sections (i) to (iii) above are often further reviewed into various economic zones/regions, with trends observed in the major divisions, categories, zones and regions.
30. The CMO review would cover the national licensing *market potential* including market research on potential income and numbers of licensees/users by bundle of rights administered, segmented further into the above major divisions, categories, zones/regions and gaps identified between results actually achieved and the market potential. Trend analysis would form part of the re or over-view.
31. To ensure cost-effective operations, the financial results of **expenditure incurred** in the delivery of the previous plans (usually sourced from the CMO's management accounts) are re-viewed in consultation with the finance department. The assessment would involve the major categories of expenditure relating to the generation of income in the above divisions and categories (where practicable) and the distribution of income to members/rights holders in the various distribution categories as set out in the CMO's distribution rules.
- b. Historic Review – Qualitative:
32. The marketing review and analysis would also involve an assessment of the **positioning** of the CMO in the market place, the status of its relationships and engagements with various major user/licensee sectors (possibly also with the associations representing users) based on the bundle of rights administered as well as the stated divisions, categorizations and zones or regions mentioned above. This could involve a further summation and review of the CMO's various marketing initiatives in the assessment of its:
- (i) awareness campaigns, promotions, public relations, advertising and related initiatives undertaken and their efficacies; and
 - (ii) effectiveness of licensing schemes and tariffs offered to major and minor users in the major divisions, categorizations and economic zones or regions.

The gaps or weaknesses which may exist in customer relations and engagements with major user/licensee sectors should be identified. These could also be filtered by marketing channels²³⁰ and human resources used to deliver the licensing services in the major divisions, categorizations and economic zones or regions.

²³⁰ See in general McDonald M and Payne A *Marketing Planning for Services* (Butterworth-Heinemann Oxford 2003),

5.10.2 Strategy Formulation:

5.10.2.1. Commentary

33. Care should be taken in approaching the marketing strategy formulation to guard against such phenomena as strategic myopia and group think. With the macro goals and objectives set in the CMO's overall strategy, the marketing function should set broad objectives (both quantitative and qualitative) for the major user/licensee sectors in the major divisions, categorizations and economic zones or regions for the various sales/licensing channels or departments. Depending upon the outcomes of the review, analysis, market research, financial results, trends and results of the gap analysis taken together with the CMO SWOT, decisions will be made on which income divisions, categories and zones or regions should be (i) *further developed*, (ii) *maintained*, (iii) *cut back on*, or (iv) *totally abandoned*. It is common cause that certain traditional income streams on the sales/licensing of physical product are in decline.²³¹ The decisions made will also take into account the major operating expenses per division, category and zone or region together with the forecasted end result for each of the final net income distributions categories. There will be a number of assumptions and estimations made in developing these objectives and projections and it is important to document these carefully. Resource deployment will be based on the prioritized list of objectives within income divisions, categories and zones/regions.

5.10.2.2. Formulating Quantitative forecasts (in currency and on numeric bases)

34. Hereafter would follow the actual forecasting of income for the CMO in the classifications detailed under the historical review – quantitative section above, including bundle of rights, divisions, categories, zones or regions. In the same manner, the CMO would forecast associated expenditure on activities delivering the income generation above and the distribution of net income to members/rights holders.

5.10.2.3. Formulating Qualitative Outcomes

35. The marketing plan would include such qualitative objectives to address the identified gaps or weaknesses which exist in the CMO's customer relations and engagements with major user/licensee sectors in the classifications mentioned above together with deployment of appropriate

²³¹ See IFPI report 2014 under Editors notes – world market revenues by format at <http://www.ifpi.org/news/music-subscription-revenues-help-drive-growth-in-most-major-markets>. See further 2014 CISAC Collections report under Downloads, release appendix – Types of Rights Highlights at <http://www.cisac.org/Newsroom/News-Releases/CISAC-Releases-2015-Global-Collections-Report>. (last accessed ...)



marketing channels and human resources. This can be accomplished by setting objectives on market position, rights awareness by users, user/CMO relationships and other stakeholder engagements through aligning the communications activities mentioned in section A above with the marketing plans and then –

- a. Scheduling awareness campaigns, promotions, public relations, advertising and related initiatives within the various licensee/user sector groups in co-operation with representative trade associations;
- b. Arranging focus group meetings (with evaluation) on CMO relationships with major licensees or licensee representative associations, followed by appropriate response programs;
- c. Exploring technology channels/platforms to launch new initiatives in reaching formerly unlicensed or underserved users;
- d. Introducing revised or new licensing schemes and tariffs (if any) tailor-made to the constantly evolving new media and other sectors;
- e. Initiating new engagements with government and regulators through reports, surveys and supply of statistical or technical data on collective management; and
- f. Revising existing or introducing new marketing channels and human resources to deliver the marketing plan.

5.10.3 Strategy Execution:

36. After having obtained 'sign-off' of the final marketing plan reflecting the various strategic goals, objectives and tactics to be employed, the CMO should proceed with implementation of the plan. Resources (including any capital expenditure) would have been allocated based on the overall strategic plan and the marketing department's share of the CMO's overall budget. It will be clear from the prioritized objectives in the plan which market segments have been identified as requiring to be *further developed, maintained, cut back or abandoned*.
37. Implementation of the plan will involve the application of various elements of the marketing mix (product [service], price, place, promotion, people, processes and physical evidence) where needed and striking a balance in the appropriate application of each depending upon income division, category or economic zone or region. For example: if any prices (tariffs) are to change (revision of tariff), this would in all likelihood necessitate engagement of the licensees/users (or their trade associations) so as to obtain buy in, which

would also affect the elements of *promotion* and *process* in the marketing mix; if on the other hand the marketing plan earmarks an economic zone or region which has received modest licensing attention, for development (in addition to normal engagement of various licensee/user groups), deployment of 'mix' elements such as *promotion* (workshops, advertising campaigns and meetings), *people* (additional staff, both field and administrative), *processes* and *physical evidence* would become essential.

38. The actual monitoring and evaluation of implementation is critical to the success of any plan. The CMO's marketing plan will have included certain assumptions which, in the execution phase, may either prove to be accurate or inaccurate and thus affect the planned results. The roll-out of a CMO's new sales/licensing services in the market with its accompanying outputs and outcomes need to be reported on and evaluated regularly so as to make any timely adjustments to the marketing plan. In this regard, close co-operation and communication is important between various CMO management disciplines. It is not possible to review, evaluate and respond to actual financial results against forecasts – compared to previous period results – if management reports reflecting the required information are not available timeously. In this regard, please also refer to the section on management report writing in Unit 4. For further commentary on strategy execution please refer to the section under budgets, schedules and plan monitoring below.

5.11 CMO Image

39. It is commonly agreed that monopolies are generally not good for markets or wider society. For this reason, in many countries monopolies are frequently the subject of government regulation. We shall not go into detail about the arguments for or against the current de facto or de jure monopoly situation of many CMOs, or the *raison d'être* for the phenomenon of monopolistic CMOs. It should suffice to indicate that CMO management needs to understand that if the society is a monopolistic service provider, it is *faced with certain public perceptions and images* that business and the community in general associates with monopolies – whether these perceptions or images are correct or not.
40. Management of CMOs have to concern themselves with the public image of their societies. There are various definitions of what constitutes an organization's 'corporate image'. In general, a CMO's corporate image is not necessarily one particular image or view but rather constitutes an aggregation of the various images and views held – at any point in time – by the CMO's various publics or audiences. This image may change over



time and vary, depending upon audience and upon other factors. It would include views held by the internal and external stakeholders of the CMO and embrace images or views obtained from any number and combinations or permutations of experiences from different sources, including from the CMO's:

- a. Mission, Vision and Values
- b. Published Strategic Plans
- c. Past Audited Annual Financial Statements and Reports
- d. Governance and Management Track Record
- e. Internal Reports
- f. Staff Policies and Practices
- g. Customer Services Charter
- h. Other Public Documents
- i. Conduct and Relationships with Stakeholders
- j. Track Record in the Enforcement of Rights, and
- k. Coverage by the Media etc.

All of the above inevitably impacts on a CMO's internal and external stakeholder audiences.

41. Most organizations regard their corporate image as an asset to be maintained, protected and invested in. In the face of globalization, dramatic changes in markets due to digitization, demands for good governance and accountability, major financial scandals and emergence of social media, increasing focus and attention is placed on the value of a CMO's 'reputation'. More recently, CMOs have begun to invest time, effort and resources to ensure that the society's 'brand value' or reputation is maintained and even extended. As part of their overall strategy development, some CMOs conduct a review or audit of their 'corporate image' on a regular basis, the frequency of which would be determined by the environmental circumstances faced by each individual CMO.

5.12 Support for CMO Income Generation

42. To address the role of a marketing department's support for CMO income generation, consideration must be given to activities and tactics which relate to both the internal and external operations of the society as well as to the current and future market of rights administration.

5.12.1 Internal Activities/Tactics

43. Marketing departments often facilitate the supply and creation of *resources and tools* which can be used by the sales/licensing staff in the execution of

their daily activities. For a sample list of typical resources or tools which are often developed, see the table in Communications in section A above termed Sample Table of Typical Communications Resources or Tools.

- 44. In view of its understanding of markets, customers, relations with stakeholders and the need for resource maximization, a CMO’s marketing department is often tasked with the responsibility of coordinating *cross-departmental communications* and collaboration within the society, especially as it relates to co-ordination of the use of shared data.
- 45. A variety of *research activities or studies* are undertaken or commissioned by CMOs to gain a clearer understanding of the user market, its demographics, current and future trends, attitudes and behaviors of licensees/users, the value of certain bundles of rights in business, different models of value assessment and attribution etc. In some cases, due to overlapping common interests, it does occur that CMOs administering different bundles of rights may collaborate in research projects so as to maximize benefits and cost savings to each other.²³²
- 46. In view of the rapidly changing licensee/user market, it is important for a CMO to be able to optimize the delivery platforms or channels of its licensing services. The rapid development of technologies, the impact of web 2.0 and other communication tools have implications for CMOs and the manner in which they are able to reach and offer licensing services to licensees/users. To ensure that CMOs remain constantly relevant, also with regard to the pricing and positioning of licensing schemes, the *research unit* responsible for platform/channel delivery and license scheme and tariff development frequently falls within the ambit of the marketing department.

5.12.2 External Activities/Tactics

- 47. In view of the nature of CMO operations and licensees/users having limited choice as to where to obtain a license, it is of great importance that a CMO closely considers its relationships with various categories and groups of rights users. Marketing departments are responsible for the overall development of relationships with licensees/users through the use of various marketing, public relations and communications platforms or channels, as well as other techniques. For a list reflecting some of the platforms or channels used in maintaining and developing these relationships, see the list in Communications section A above titled Delivery Channels or Mediums.

²³² See the example in the United Kingdom of collaboration between CMOs, PPL and PRS for Music, in research and related activities at <http://www.musicworksforyou.com/about/musicworks>



5.13 New and Developing Usage Models

5.13.1 New Technologies

48. With the rapid advance of technology in general and digitization in particular, emphasis on and business models operating in the new media or digital Internet space is growing. Although from a relatively low base, CMO income from new media/on-line usages has been growing exponentially. According to reports published by both CISAC²³³ and the IFPI²³⁴, digital use income to members/rights holders continues to grow at a rate greater than that of traditional sources of incomes, be they managed collectively or individually. Of course, the continued growth of new media income for members/rights holders is also dependent upon sufficiency of legislation in some countries, viable business models (i.e. not built on 'free' copyright), improved bandwidth and connectivity (for countries where infrastructure roll-out is still at an early stage), advances made by mobile technologies and the change/movement in patterns of advertising from traditional media to the new media/on-line platforms.

5.13.2 New and Evolving Markets

49. Taken as a whole, many developed markets are well served by CMOs and the extent of market penetration is high in most of the traditional income segments (with some exceptions). It is, however, a fact that there are still markets with no or ineffectual collective management of rights. In quite a number of developing markets, CMOs are at an early stage of evolution and the market penetration of licensing activities as well as the value attribution of rights in certain user segments is modest. This of course indicates the future prospects of CMOs in those markets and the possibilities for significantly improved growth rates in income. The de-regulation of frequency/telecoms spectra leading to growth in traditional uses such as broadcasts, cable/satellite operations and new media uses holds significant potential for members/rights holders in those markets. Thus, in markets where there is no/ineffectual collective management, there is conversely potential for the establishment or improvement in the operations of CMOs.
50. Part of the research and analysis undertaken by a CMO's marketing function is to clearly identify prospects of both such new technology and evolving market prospects.

²³³ See CISAC Collections report at <http://www.cisac.org/Newsroom/News-Releases/CISAC-Releases-2015-Global-Collections-Report> with press release appendix. (last accessed ...)

²³⁴ See IFPI 2014 report at <http://www.ifpi.org/news/music-subscription-revenues-help-drive-growth-in-most-major-markets>. (last accessed ...)

5.14 Leverage of Any Social and Cultural Activities

5.14.1 Context

51. The evolution of what has been termed social and cultural activities as a symbol of solidarity between CMOs – particularly in the authors' rights fields of collective management of 'performing rights' – is well known. Traditionally, the activities were funded by way of a deduction, not to exceed 10% of a CMO's net domestic collections (after expenses). The agreement to the application of such a deduction is found in the bilateral contracts of reciprocal representation between CMOs and is specifically earmarked for the provision of what is termed social and cultural activities. The *social activities* are widely described in the agreements as: members' pensions, benevolent or provident funds, while *cultural activities* are described as being the encouragement of the national arts. In some countries, regulators, as a condition of the CMO's license to operate, require the society to establish and run social and/or cultural programs. The important marketing aspect of these social and/or cultural activities is that CMOs and their members/rights holders have taken on a responsibility to address these two important areas affecting their members/rights holders and the wider community.
52. Since the early 1990s, the justification for and level of these deductions has been the subject of much focus and discussion within the authors' rights CMO movement. As a consequence of these discussions, the deductions, their level, the programs funded by the deductions and their governance have been reviewed by CMOs with variations being introduced to the abovementioned contracts of reciprocal representation. In many countries, these social and/or cultural programs are now being run as separate legal entities or foundations – funded in some measure by deductions from net CMO revenues with additional funding being contributed by CMO members themselves and other organizations supporting the laudable objectives of the activities undertaken (in some countries, contributions to such foundations are tax-deductible allowances). Irrespective of the method of funding, CMOs are investing in the present and future welfare of members/rights holders and programs advancing culture, the production of new music, songwriters, special film direction, scriptwriting and the promotion of the arts in general in their respective countries.

5.14.2 Examples of Programs Run by Various CMOs

53. Under the *social* category, member benevolent funds have been established, involving:- financial assistance in times of hardship, buying co-operatives,



loan schemes, once-off grants, medical assistance, funeral benefits and pension or retirement funds etc.

54. Under the *cultural* category, programs encouraging the development and education of members/rights holders, the provision of grants, scholarships and awards or prizes and funding of programs for contemporary art music, film, commissioning of new works, publications of books and scores, attendance at and participation in trade and other important industry fairs, secondary schools outreaches and other initiatives in the promotion of copyright and culture have been implemented.

5.15 Promotional Activities and Advertising

5.15.1 The place of promotional activities and advertising

55. Depending upon the constitution of a CMO, its legal nature (private, public or government department), prevailing copyright regulations, the operating license issued to a CMO and other related factors, a society may have a fairly narrow or broad focus and scope of promotional activities which it undertakes. The overall balance on type, focus and frequency of activities as well as the choice of channels of marketing to deliver these activities is often found in the CMO's strategic plan. This plan would at a high level describe how and what specific promotional events and other support endeavors the CMO will deliver in the mission it undertakes on behalf of members/rights holders and other stakeholders.

5.15.2 Scope and Nature of Activities

5.15.2.1. Primary Stakeholders

56. The scope, nature and frequency of a CMO's promotional activities often revolve around the CMO's major stakeholders, depending upon the stage of development of the CMO and awareness levels of the collective administration of rights. A major focus would be activities in support of the core functions of the CMO. Some of the primary stakeholder audiences have been identified in the Communications section A above, together with examples of the types of key messages which the CMO may intend to deliver and the channels which it might use to reach these stakeholders. The type of promotions a CMO could undertake would often be determined by the demographics of its members/rights holders and licensee/user market. Typically the objective of promotional activities often involves the undertaking of various meetings, workshops, campaigns and other events to improve the understanding of rights by prospective members and compliance by

licensees so as to be able to ensure that the specific bundle of rights are effectively protected and administered.

5.15.2.2. Secondary Stakeholders

57. The emphasis on messages may be slightly different when addressing stakeholders which are not directly members/rights holders or licensees/users. Here, the activities and events may be geared more to providing general information, orientation and education about collective management, the particular bundle of rights which the CMO administers, issues around governance, transparency and accountability of the CMO etc. Key programs of promotional activities often involve the undertaking of various informational and educational workshops, exhibitions, events, trade fairs and similar actions to improve interface between the CMO and its secondary stakeholders.

5.15.3 Advertising

58. As will be noticed from Communications section A above, marketing departments at CMOs make use of advertising in various scenarios. In view of the cost involved in advertising in traditional mass media, a CMO's non-profit status, limited marketing budgets and the absence of traditional competitors, the level of use of advertising by CMOs is often event-focused or makes use of targeted short-run campaigns whether they be in the printed media, broadcast media, Internet dedicated media, outdoor media and other advertising or similar channels. Nevertheless, CMOs have used to good effect various forms of advertising – often paid for, sometimes a co-operative venture with other CMOs or industry associations and possibly also trade-offs or barter deals – to communicate messages of importance to the CMO, its stakeholders, the music, audio-visual industry or wider copyright business.

5.16 Budgets, Schedules and Plan Monitoring

59. As with all plans, the Marketing Plan has to be budgeted for, with projections on income and expenditure justifications, monitoring, reporting on variances to budgets and past performance. As the CMO implements its marketing plan, it should report and monitor not only on quantitative objectives of the plan but the qualitative aspects also. Results/outcomes linked to priorities and time frames with set deadlines are important. Where the roll-out of tactics and activities in the marketing plan is not matched and timed with corresponding activities in other functions within the CMO this may well affect planned results. Historically businesses and CMOs had separated the



reporting of their various departmental functions and plan roll-outs from the detailed financial results achieved by the plans, provided the financial results were within forecast or budget. With the growing emphasis on integrated and sustainability reporting, many CMOs are addressing their reporting structures to ensure that close co-ordination of plans – financial (largely quantitative) and qualitative – as well as the reporting on outcomes are reviewed together. In this way, the scheduling and reporting are combined to ensure that holistic reviews of the progress of the CMO can take place in context.

60. It could be argued that members/rights holders are really only interested in the immediate financial results of a CMO and, in particular, the amounts available for distribution to them. However, if care is not taken regarding the immediate future sustainability or ‘going concern’ status of the CMO in its plan roll-outs, attention to only short-term quantitative results may be expensive in the longer term. Readers are again referred to the discussion on both financial and management reporting in Unit 4 of this tool kit. Non-financial marketing plan outputs and outcomes are just as important as the financial results. For this reason, CMOs are encouraged to establish appropriate monitoring and reporting structures and formats at regular time frames. Non-financial marketing plan outcomes should be measured in tandem with management reporting, but no less than once per month.
61. To assist with an understanding of the non-financial measures of a CMO, a simple example table (which could be expanded) is provided below.

EXECUTION AND MONITORING OF MARKETING PLAN

Strategic Goal	Objectives	Tactics	Responsibility	Deadlines/ Timing	Budget/s
Income growth	License all major users	Create matrix of all major users	Licensing executive	Various by week and month	TBA
	Validate amounts owing by major users	Audit returns from major users	Key account managers	Monthly, quarterly and annually	TBA
	Better licensing tool kits	Create new licensing kits	Marketing staff	Specific date/s	TBA
	Improve Image with user bodies	Engage user bodies	PR/Marketing officials	Specific dates	TBA
	Improvement of income streams	Monitor various market segments	Management accounting and marketing staff	Weekly, monthly, quarterly, annually	TBA

Once appropriate reporting mechanisms have been created for the CMO, these could be tabled with the monthly management accounts, financial and other results. The joint consideration and evaluation of both the financial and non-financial results will ensure that any responses (corrective, expansionary or down-sizing in nature) will be taken with sufficient information about the market at the CMO’s management’s disposal.

LIST OF SIGNIFICANT TOOLS IN UNIT 5

Communications and Marketing

- CMO Mission and Values
- Strategic Plan Working Documents (including Environmental scans, SWOT analysis and List of Primary and Secondary Stakeholders)
- Previous Plans
- List of Stakeholder Audiences
- Listing of Key Messages
- Table of Standard Resources or Tools
- List of approved Delivery Channels or Mediums
- Communications Plan Timetable
- Crisis/Disaster Communications Plan
- Summarized Financial Results (last 3-5 years)
- Standard Market Segmentation Table
- Segmented Financial Results (Management Reports – last 3 years)
- Segmented Financial Forecasts (1 – 3 years)
- List of Previous Major Marketing Initiatives
- Marketing Plan Execution Table

LIST OF REFERENCES

McDonald M and Payne A *Marketing Planning for Services* (Butterworth-Heinemann Oxford 2003)

Negroponte N *Being Digital* (Hodder & Stoughton London 1995) pp. 227 – 231

Shaluf IM, Ahmadun F and Said AM (2003) ‘A review of disaster and crisis’, *Disaster Prevention and Management: An International Journal*, Vol. 12 (1) pp.24 – 32



UNIT 6 DOCUMENTATION AND DISTRIBUTION – NOTES

INTRODUCTION

1. We have mentioned throughout this tool kit that collective management of copyright works by definition involves the processes of rights representation, licensing, documentation and distribution. Key to a CMO's success is the documentation of members'/rights holders' details/information and their works together with the distribution of the net income after payment of expenses to the members/rights holders whose works have been used. To effectively carry out this mandate, a CMO must know which members/rights holders it represents as well as what works they have an interest in. The subject of licensing of users has already received treatment in other Units of the tool kit. Below for contextual understanding of the main elements of this Tool Kit, we provide a short snapshot of the documentation activities around the member/rights holder details, their works and the distribution of income. It needs to be noted that today's CMO is not only judged on the revenues generated but also on the distribution results.

DOCUMENTATION

2. A CMO has as its primary mandate the advancement of the interests of its members/rights holders and those of its affiliated CMOs. To be able to execute this mandate, it is of critical importance for the CMO to have full information (documentation) about those parties whose rights it represents, namely:
 - a. Who these members/rights holders actually are (domestic and international rights holders);
 - b. Which works they own, represent or have a copyright interest in;
 - c. Whether the term of their interest in these works is –
 - For the full term of the rights in the work, or
 - Only for a determined period of time;
 - Which particular bundle of rights the CMO administers in these works;
 - d. What countries the CMO's representation extends to;
 - e. Whether there may be parties to whom its members/rights holders have delegated certain rights, possibly nationally or internationally.

It is important for CMOs to document in a systematic manner the details of their own members/rights holders and their works and where necessary to have access to certain details of those rights holders and works belonging to affiliated CMOs which they represent. Having indicated this, it needs to be noted that in some jurisdictions a system of mandatory collective management exists.²³⁵ In such jurisdictions, rights holders are automatically represented by a designated CMO in terms of legislation, and are not permitted to license the usage of their rights except through the collective management system. In such a system, the requirement to capture all details of a rights holder in order to fully represent such rights holder's rights may be less stringent. What does become important, however, is that the CMO needs to reserve the monies collected in respect of rights holders who have not yet joined it as members, to ensure that it can ultimately get in contact with such rights holders for purposes of paying them such monies.

6.1 Obligation to Register, Declare or Notify

3. All CMOs, irrespective of the bundle of rights administered, rely on rights holders to register with their respective societies (apply for membership), declare or notify the details of their works (or a part interest in works) and disclose their interest in contracts/agreements to their respective societies. In the absence of clear information relating to the above, the subsequent fair and equitable division of distributable income between the different rights holders in the said works will be very difficult to achieve. Many CMOs today offer the possibility of either manual or electronic affiliation or registration by members/rights holders with their society including the simultaneous declaration of their works (for both national as well as international declaration).

6.2 Databases

4. To ensure that good administration is effected, each CMO must establish extensive national database operations around the required information highlighted above. It is assumed at this stage that the CMO's mandates for specific rights administered in particular works have been established (bundles of rights and works), for example performing rights or reproduction rights in musical/audio-visual works (and whether these are full or limited

²³⁵ See further on mandatory collective management Ficsor M 'Collective Management of Copyright and Related Rights from the Viewpoint of International Norms and the Acquis Communautaire', in Gervais D *Collective Management of Copyright and Related Rights* (Kluwer Law International The Netherlands 2010) at 42 – 60.



mandates).²³⁶ Each CMO maintains a *database of national members/rights holders*. In the case of CMOs administering musical and audio-visual works, societies which are members of the federations, BIEM and CISAC, have created international tools facilitating the provision and exchange of key data regarding their members/rights holders. Please refer to the paragraph titled International Co-operation below.

5. In establishing the national members'/rights holders' works documentation database, there may be practically at least three subsidiary databases: the (i) *single works database*; the (ii) *composite works (sound carrier and/or audio-visual/film carrier files) database*; and the (iii) *contracts database (of agreements between authors and publishers, domestic publisher administration agreements and international publisher agreements – general catalogue or specific) in respect of musical works and any relevant agreements between directors, scriptwriters and producers or other rights holders in the case of audio-visual works*.

6.2.1 Member/Rights Holder/CMO Representation Data Base

6. A CMO's membership data base would normally contain important business information about the member, rights holder or represented CMO; be they a natural person (composer, author, director, scriptwriter etc.), an incorporated business (such as a music publisher etc.) or an international business affiliate. The data elements or information frequently included in this national member, rights holder or represented CMO data base are:

- a. Domestic members/rights holders

Name of composer, author, publisher, director, scriptwriter (containing full individual, business or trading names); pseudonym/stage name (if any); national identity number (including date of birth or death) or company registration number; nationality; internal member number; IPI number – if issued (see paragraph below on International Co-operation); capacity or role of member (composer, author, translator, arranger, original publisher, sub-publisher; director, scriptwriter, producer); category of membership (where applicable), status of member (for example – voting or non-voting); date of expiry of membership (where applicable); member's address and contact details (physical, postal, electronic address/email, telephone numbers); country of residence; representation or management information; payee name (for distributions); payee bank account details etc.

²³⁶ For example, rights holders may have granted the CMO only the performing rights mandate or possibly also certain reproduction rights mandates. Both of these mandates may be in full or limited, for example reproduction rights in musical works may exclude phono-mechanical rights.

b. Affiliated CMOs/International rights holders

Name of affiliated CMO/International rights holder; company registration number; Registered address details (physical, postal, electronic addresses/ email, telephone numbers); Country of CMO residence; bundle of rights covered by representation agreements and territory involved; payee name (for distributions); payee bank account details etc.

6.2.2 Works Databases – Musical works

7. Depending on individual circumstances, CMOs often create a number of national databases involving musical works. The primary database of individual songs and instrumental works (or the master database) and the other databases for those works included in either sound or audio-visual carriers (CDs/DVDs/Films etc.). A CMO normally commences with the population of its national works data followed by the addition of data of foreign works which it represents and are active in its territory. Data elements or information frequently included in the above mentioned databases are:

a. Domestic individual works

Original title, sub-title (if any); rights holders and the division of fees details (composer, author, publisher etc.); duration (in minutes and seconds); genre of work; instrumentation; date of composition; internal work number; ISWC number – if issued (see paragraph below on International Co-operation); name/s of recording artist or band (if commercially released); producer catalogue number and ISRC (international standard recording code number where available).

b. Sound and audio-visual carriers

(i) Sound carriers/albums

Title of album and alternative titles (if any); name of featured artist or band; producer catalogue number; format type (CD, LP, ELP, Tape etc.); production year; list of titles appearing on the carrier/album; rights holders (composer, author, publisher etc.).

(ii) Audio-visual carriers

Title of audio-visual work/DVD/Film; duration of work; type of work (one-off movie, series etc.); series and episode numbers; featured actors; production country and year; internal work number; list by title of all musical works cues; duration (in minutes and seconds) of cues;



rights holders and the division of fees details for each cue (composer, author, publisher etc.).

c. Foreign works

Often data relating to works of members/rights holders belonging to affiliated CMOs is supplied either by the local representative publisher or directly by those CMOs through electronic data exchange or by accessing these details from international databases (see paragraph titled International Co-operation below).

6.2.3 Works Databases – Audio-visual works

8. Data elements or information frequently included in these databases are:

Title of Audio-visual work/DVD/Film; duration of work; type of work (one off movie, series etc.); series and episode numbers; featured actors; production country and year; rights holders (directors, scriptwriter, producer etc.); production country and year; internal work number; ISAN number – if issued (see paragraph below on International Co-operation).

6.3 Contracts/Agreements

6.3.1 Publisher with composer/songwriter – musical works

9. Music publishing agreements between publishers and authors take on a number of forms including the single song agreement, the agreement for an album of songs and the exclusive songwriter/composer agreement (which may be for a period of time, a number of songs or number of albums). The agreements specify at the minimum the bundle of rights, duration, territory and renewal conditions. In cases where publishing agreements are not for the full term of copyright in the works, it becomes important to have accurate dates of commencement, expiry, renewal and applicable territories of the said agreements.

6.3.2 Publisher with sub-publisher – musical works

10. Music publishing agreements between publishers and other publishers may be of an administrative or a representative nature. In any event, once again the dates of commencement, expiry, renewal and applicable territories of the agreements are important for the administration of rights and accurate distribution of income.

6.3.3 Directors, Scriptwriters etc. with producers – audio-visual works

11. Various commissioning agreements between audio-visual co-authors and producers may have an impact on the works data base and therefore the dates of commencement, expiry, renewal and applicable territories of the agreements are important for the administration of rights and accurate distribution of income.

6.4 Division of Fees Plan

12. In the event of CMO members/rights holders not setting out in the contract between them their agreed split of fees for specific works and rights usages (reflecting performing rights and reproduction rights or private copy – where these are administered) many CMOs have a standard default plan for the division of fees between various recognized rights holders in a musical work or audio-visual work. This division of fees plan frequently forms part of a CMO's distribution rules.

6.5 International Co-operation

13. Over many years of the collective administration of rights, and in view of the feasibility of members/rights holders releasing a work instantaneously world-wide, federations of CMOs or rights holder groups have developed a number of international standards, tools and data bases with the objective of facilitating the seamless exchange of data between their members and affiliates world-wide. In the field of musical and audio-visual works, further details can be accessed on the CISAC website²³⁷, listing the developed Identifiers as well as Tools and Data bases available to CMO members of CISAC and BIEM.

DISTRIBUTION

6.6 General Distribution Rules, Policies and Practices

14. As has been mentioned before in this tool kit, it is accepted that collective management of rights is not an exact science but strives to be an equitable one. With the use of tracking, monitoring and other tools, CMOs have been able to achieve high levels of accuracy in the distribution of income to members/rights holders. Many CMOs provide published guidelines to their constituencies on how the society's net income is allocated across the various distribution categories and classes.

²³⁷ See at <http://www.cisac.org/What-We-Do/Information-Services> (accessed on 25 February 2015)



15. The landscape and basis for how the CMO's distributable income is allocated will normally be found in its approved distribution rules. In addition to this the CMO's board may have passed further resolutions to provide clarity and direction on certain distribution policies and practices. Other documents which will inform a CMO's distribution policies and practices will be the undertakings given in bilateral agreements of representation between CMOs and any international codes of good conduct, standards and rules established by the CMO federation of which each CMO is a member. Lastly, where the CMO is a statutory society or department of a government ministry, there may be some variations or further regulations set out by government relating to the allocation of distributable income. This may be particularly applicable to the distribution of private copy remuneration.

6.7 Distributable Income Computation

16. The principles around the computation of distributable Income are fairly standard. A CMO's net income after expenditure usually contains three elements – net domestic license income; net non-license income (usually interest on moneys pending distribution, other non-license income etc.); and net foreign income for the CMO's repertoire used in other countries. Generally, the net foreign income is sent to a CMO in an already processed state, largely, and is distributed to the domestic rights holders of the works reported by foreign CMOs as having been used (less any small additional administration or processing charge); the net non-license income is usually treated in one of two ways: (i) the reduction of the CMO's overall administration costs (and thus passed on proportionately to all members/ rights holders participating in the net distributable income); or (ii) a separate non-license income distribution made (usually proportionate to the previous distribution earnings of members/right holders and affiliated CMOs).
17. We now turn to discuss the distribution of net domestic license income. The general formula to arrive at the amount for distribution in respect of domestic license income where there has been no authorization of any reserve transfers (transfer to/from reserve fund) is:
 - a. Gross domestic license income
 - b. Less: Domestic administration costs
 - c. Less: Social and cultural deductions (if any).

Any taxes due on royalty earnings are deducted from actual member, rights holder or affiliated CMO credits before pay over (in accordance with the CMO's local tax laws).

18. The net domestic license income allocation process involves an analysis of CMO income segments making up the net distributable domestic income as identified in each CMO's financial reports (see Unit 4 under Management Report writing) which are apportioned into the various distribution categories and classes in terms of the society's distribution rules. The categories and classes are then matched with usage data obtained for the respective distribution categories and classes. In the main, performing rights CMOs derive their major income from broadcasting, general licensing (public performance) and new media (streaming, web-casting services etc.) sources; mechanical or reproduction rights CMOs derive their income from broadcast reproductions, phono-mechanical rights, new media (download services), synchronization (where applicable) and private copy levies.

6.8 Usage Data Collection, Practices and Processes

19. The accuracy and equity of any CMO's distribution process is dependent in part upon the quality and timeous availability of usage data. Distribution data policies and practices of CMOs vary from country to country, but generally there are a number of elements in the process of allocating net income to usage data. Some CMO's data collection practices for major broadcast users require only broad usage information, whereas other CMO's practices require additional information relating to duration of usages in minutes and seconds as well as time of day of these usages.

6.8.1 Data Collection

20. Some of the various data usage collection methods used by CMOs are provided below.

- a. Full (100%) census

Broadcasting is often a major segment of distributable income. In today's growing digital world, data relating to broadcast usage is becoming increasingly available in digitized reporting format. Where CMOs have the capacity to process large volumes of data, they distribute broadcast income on the basis of a 100% census of the usages.

- b. Statistical Sampling and Income Pooling

Some CMOs consult specialist statisticians to establish a sampling system for collection and processing of usage data on the basis of certain objective samples of usages and income streams. Sampling systems may for example involve elements relating to (i) amount of income in relation to total distributable income, (ii) the grouping of some income streams of



users with that of other users, (iii) selected samples of usage data (which may be systematic/predetermined or random), (iv) equity between various categories of usages and rights holders' works used, as well as (v) other elements.

c. Use of analogous data/information – in the case of musical works

Where, for example in many countries, direct usage data is not available from small and medium business licensees (particularly in the public performance field), broadcast logs may be used as analogous data to distribute certain categories of net general license income.

d. Background music suppliers and market surveys – in the case of musical works

Many users outsource the provision of background music to third party operators in this field. In addition to provision of the service to users, these operators also supply works usage information. Some CMOs undertake or commission various market surveys (at times in collaboration with other CMOs) to ensure that their usage data collection practices remain valid.

6.8.2 Control and review of distribution data collection

21. The questions of fairness, equity, cost effectiveness and risk have to be considered by all CMOs when obtaining and processing usage data for distribution. Many CMOs have introduced control systems to ensure that the process of collecting usage data is the subject of internal control procedures which are reviewed regularly. As part of their overall data collection systems, many musical works CMOs make use of radio and television monitoring services either as a supplement to or a substitution for their data usage collection activities. In the case of audio-visual CMOs, the use of monitoring services is limited to television or cable operators. The extent to which these services are used is dependent upon the availability of digitized data of each CMO's repertoire and a number of other important factors. Some CMOs outsource the collection of other usage data to third party market research companies. The use of sampling, analogy and related systems is often validated by independent statisticians who, from time to time, review the CMO's precedent data and statistical models so as to provide ongoing assurance as to whether the models continue to be valid and appropriate.

6.9 Distribution Practices and Methods

6.9.1 Activity/usage Matching

22. Once valid usage data has been sourced by the CMO for the various income pools, this usage data is matched against its data bases of works and respective rights holders. Many CMOs employ special electronic software tools to match the data bases of usages with the CMO's master data bases. It does, however, occur that due to various reasons, certain works' usages may initially be un-matched. For this reason, most CMOs have a specialist section whose responsibility it is to research, identify and document works which are listed as un-matched works' usages.

6.9.2 Value Attribution Coefficients – Performing Rights

23. The exact nature, practices and methods of value attribution for net income available to captured usage data vary between CMOs. Some practices for musical works CMOs in the distribution of radio income include the allocation of net available income directly proportionate to the number of times each work has been 'played'. Other CMOs' radio distribution practices involve, in addition to proportionate allocation, coefficients which involve the duration of works, instrumentation/complexity of work factor or the time of day of broadcast. Practices in the case of television broadcast are frequently done on the basis of grouping of program types and the usage time in minutes and seconds of captured works.

6.9.3 Value Attribution Coefficients – Mechanical/Reproduction Rights/Private Copy

24. Generally the distribution practices for broadcast mechanical rights bear some similarity to those of performing rights. Value attribution for phono-mechanical rights for a product, however, is often based on the prices of the product (wholesale, published dealer or retail) or a fee per album or track sold. Some CMOs take into account ranges of priced product, for example, budget priced, standard priced or premium priced product. In the case of new media, value attribution is often directly proportionate to the number of downloads/reproductions. Net income from private copy levies is usually split at source between audio and video and then value attribution for distribution varies between type of blank media or recording devices. The basis of distribution varies between CMOs but proportionate analogy and market research systems are two more popular methods.



6.9.4 Frequency of Distributions

25. Each CMO's distribution rules or policies would normally stipulate the minimum number of distributions for a particular category of income to be undertaken in any single financial year. Determining factors taken into account often include cost-effectiveness and level of income of the various categories. CMOs, which are members of international federations, agree to abide by codes of good practice which such federations set out for the distribution of various categories of income by their members.

6.10 Distribution Standards and Statements

26. In general, federations of CMOs have set out certain best practices which their members should observe when transmitting or delivering distribution statements to their own members/rights holders or affiliated CMOs, including what minimum information should be provided. The formats for the provision of statements accompanying any distributions to members/rights holders or affiliated CMOs do vary between societies. The CMO federation best practices normally set out the formats and methods of electronic data exchange when undertaking distributions. All CMOs observe a minimum practice of providing an interpretation legend to accompany their distribution of royalties to members/rights holders and affiliated CMOs. The statements to members/rights holders and affiliated CMOs would normally include the following minimum details: (i) Rights distributed, (ii) Period of collections covered, (iii) Categories of income included, and (iv) Details of works by title, shares distributed together with any internal or international identification numbers.

6.11 Unidentified and Undocumented Works Usages

27. In the distribution process, there will always be a number of works usages which have been captured but for which the CMO has no current data – either relating to a rights holder or the work. For such cases, CMO federations have established policies and practices including the circulation of lists of these unidentified or undocumented rights holders or works and a period during which claims may be made.

SCHEDULE OF SIGNIFICANT TOOLS IN UNIT 6

Documentation and Distribution

CMO's Membership Rules

Data bases of Members, Works and Contracts

CMO Division of Fees Plan

International Federation Documentation Best Practice, Tools and Data Bases

CMO Distribution Rules and Board Resolutions on Policies and Practices

Distribution Usage Data Collection Principles and Practices

Distribution Data Advisors (Independent Statistician, Market Research Consultants)

International Federation Distribution Best Practice, Tools and Formats

LIST OF REFERENCES

Ficsor M *'Collective Management of Copyright and Related Rights from the Viewpoint of International Norms and the Acquis Communautaire'*

Gervais D *Collective Management of Copyright and Related Rights* (Kluwer Law International The Netherlands 2010) at 42–60



BIBLIOGRAPHY AND GENERAL REFERENCE MATERIAL AND PUBLICATIONS

LIST OF RELATED WIPO PUBLICATIONS

Copyright Collective Management in Music

Educational Material on Collective Management of Copyright and Related Rights – Modules 1-3

Collective Management of Copyright and Related Rights – Brochure

LIST OF HYPER-LINKS TO CMO REPRESENTATIVE ASSOCIATIONS

Bureau International des Sociétés Gérant les Droits d'Enregistrement et de Reproduction Mécanique (BIEM), refer to <http://www.biem.org/index.php?lang=en>

International Confederation of Societies of Authors and Composers (CISAC), refer to <http://www.cisac.org/>

Society of Audiovisual Authors (SAA), refer to <http://www.saa-authors.eu/>

NOTE ABOUT THE AUTHORS

Robert Hooijer

Independent Collective Management of Rights Consultant; former CISAC Director of African Affairs and CISAC Interim Director General; retired Chief Executive of SAMRO Limited; Fellow of the Institute of Directors in Southern Africa; Fellow of the Institute of Chartered Secretaries and Administrators (United Kingdom and Southern Africa). Robert has wide experience in governance, management and development of existing and new CMOs as well as involvement with strategy initiatives in the field of collective management across some fifty countries and CMOs.

J Joel Baloyi

Senior Lecturer in Commercial and Intellectual Property Law, University of South Africa; Copyright and Entertainment Law Consultant; Former Head of Legal and Company Secretary for SAMRO Limited; Advocate of the High Court of South Africa; Member of the International Association of Entertainment Lawyers (IAEL); Member of the Music and Entertainment Industry Educators Association (MEIEA). Joel has published and presented on copyright law and has consulted in many areas of the entertainment industries, including music, film, TV, theatre and book publishing.

For more information contact WIPO at www.wipo.int

World Intellectual Property Organization

34, chemin des Colombettes

P.O. Box 18

CH-1211 Geneva 20

Switzerland

Telephone:

+4122 338 91 11

Fax:

+4122 733 54 28